99-1939

No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

LUKE AIR FORCE BASE, ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a union's statutory right to attend "any formal discussion" between an agency employer and a bargaining unit employee regarding "any grievance" includes discussions concerning the employee's discrimination complaint filed under Equal Employment Opportunity Commission procedures.

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v.

LUKE AIR FORCE BASE, ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Federal Labor Relations Authority (Authority) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished judgment and opinion of the court of appeals is set forth at Appendix (App.) A1-A3.[1] The decision and order of the Authority (App. C1-C29) is reported at 54 FLRA 716.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1999. App. A1. A petition for rehearing was denied on March 14, 2000. *Id.* at B1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The court's denial of the Authority's petition for rehearing and petition for rehearing en banc is also appended to the petition. App. B1.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. III 1997) are reproduced in the appendix. App. D1-D7.

STATEMENT

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute (Statute) governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

The Statute makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1) and (8). The instant case involves an unfair labor practice under section 7116(a)(1) and (8) and concerns the Authority's interpretation of the representational right set forth in section 7114(a)(2)(A) of the Statute.

Section 7114(a)(2)(A) provides that a federal agency is obligated to afford the exclusive representative of an appropriate bargaining unit an opportunity to attend "any formal discussion" regarding "any grievance." 5 U.S.C. 7114(a)(2)(A). The purpose of this statutory right is to "provide the union an opportunity to safeguard its interests and the interests of employees in the bargaining unit – viewed in the context of a union's full range of responsibilities under the Statute." *U.S. Dep't of Justice, Bureau of Prisons, Fed. Correctional Inst. (Ray Brook, NY)*, 29 FLRA 584, 589 (1987) (*Ray Brook*), *aff'd sub nom. American Fed'n of Gov't Employees, Local 3882* v. *FLRA*, 865 F.2d 1283 (D.C. Cir. 1989) (*AFGE* v. *FLRA*).

Specifically, the exclusive representative has a right to be represented at such a discussion if there is (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or personnel policy or practice or other general condition of employment. *See General Servs. Admin., Region 9 & American Fed'n of Gov't Employees, Council 236*, 48 FLRA 1348, 1354 (1994).

The only element at issue in this case is the fourth — whether the discussion concerned a "grievance." The Statute defines "grievance" as "any complaint — (A) by

any employee concerning any matter relating to the employment of the employee." 5 U.S.C. 7103(a)(9). The question here is whether an employee's discrimination complaint filed pursuant to the Equal Employment Opportunity Commission's (EEOC) procedures (29 C.F.R. pt. 1614) is a "grievance."

In interpreting the statutory representation right set forth in section 7114(a)(2)(A), the Authority has determined that discussions between an agency employer and a bargaining unit employee about the employee's EEO complaint concern a "grievance" as that term is used in section 7114(a)(2)(A). App. C21-C23. As such, when an agency employer holds a formal discussion with a bargaining unit employee regarding that employee's EEO complaint without affording the union adequate notice and an opportunity to be represented, the agency violates section 7114(a)(2)(A) and commits an unfair labor practice. *See id.* at C25-C26.

B. The Instant Case

1. Factual Background

This case is the most recent in a series of unfair labor practice cases decided by the Authority and the courts of appeals concerning whether a union has the right to be represented during a formal discussion of an employee's complaint filed pursuant to a statutory procedure such as that governing EEOC complaints or Merit Systems Protection Board (MSPB) appeals (5 C.F.R. pt. 1201) (hereafter referred to as "alternative statutory procedures") rather than pursuant to the grievance procedure established by the parties' collective bargaining agreement. The case came before the Authority due to events that occurred at Luke Air Force Base (Luke AFB), Arizona.

The facts are not in dispute. The American Federation of Government Employees, Local 1547 (the union) is the

exclusive bargaining representative for a unit of employees at Luke AFB. On January 19, 1995, representatives of Luke AFB met with Tillie Cano, a bargaining unit employee, to discuss settlement of her discrimination complaints filed pursuant to EEOC procedures. Ms. Cano had named the union president as her representative, and he had attended a meeting between Ms. Cano and agency representatives the previous day. However, the union president was never told about the January 19 meeting, and it was conducted without him. At this meeting, Ms. Cano was presented with a proposed settlement and, after some negotiations between her and representatives of the agency, a settlement was executed. App. C2-C3.

In response, the union filed an unfair labor practice charge with the Authority, alleging that Luke AFB violated the Statute by not providing the union with notice and opportunity to attend the meeting during which a bargaining unit employee's EEO complaints were settled. The Authority held that the January 19 meeting satisfied the elements of a formal discussion and that Luke AFB failed to provide the union with the opportunity to attend. Specifically, the Authority held that Ms. Cano's EEO complaints constituted "grievances" within the meaning of section 7114(a)(2)(A). App. C21-C23. Rejecting Luke AFB's assertion that under section 7114(a)(2)(A) a matter cannot be a "grievance" where the parties have excluded it from their negotiated grievance procedure (NGP), the Authority held that the broad statutory definition of a "grievance" is not dependent on the scope of the NGP.[2]

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[2]Under 5 U.S.C. 7121(a)(2), a grievance procedure negotiated as part of a collective bargaining agreement "may exclude any matter from the application of the grievance procedures which are provided for in the agreement." As authorized by this section of the Statute, the collective bargaining agreement between the union and Luke AFB excluded discrimination complaints from the scope of the NGP.

App. C21. The Authority, therefore, found that the agency violated section 7116(a)(1) and (8) of the Statute by failing to provide the union with notice and an opportunity to be represented at the January 19 session. C25-26

On review, the Ninth Circuit reversed the Authority, finding that discrimination complaints brought pursuant to EEOC procedures are not "grievances" within the meaning of section 7114(a)(2)(A) of the Statute. The court also noted that the parties had excluded discrimination claims from their NGP. A3

The Ninth Circuit decision was written against a background of conflicting administrative and judicial precedent. Because the court's decision can best be understood in this context, a brief history of the relevant precedent is provided prior to analyzing the court's opinion in the instant case.

2. Relevant Judicial and Administrative Precedent

Three circuit courts of appeals have considered the question whether discussions between an agency employer and a bargaining unit employee about the employee's complaint filed pursuant to alternative statutory procedures concern a "grievance" as that term is used in section 7114(a)(2)(A). Two of those circuits — the United States Courts of Appeals for the District of Columbia and Tenth Circuits — agree with the Authority, the agency charged with administering the Statute, that an employee's complaint filed under alternative statutory procedures is a "grievance." However, the United States Court of Appeals for the Ninth Circuit has created both an inter-circuit and an intra-circuit conflict by holding that discussions concerning discrimination complaints filed under EEOC procedures do not concern a "grievance" within the meaning of section 7114(a)(2)(A).

a. The Ninth Circuit's Decision in *IRS, Fresno* v. *FLRA*

The Authority first considered whether a discussion regarding an EEO complaint was a "formal discussion" within the meaning of section 7114(a)(2)(A) of the Statute in *Internal Revenue Service, Fresno Service Center, Fresno, California*, 7 FLRA 371 (1981) (*Fresno Service Center*). There the Authority found that a counseling meeting[3] held to resolve an individual employee's allegation of discrimination concerned a "grievance" and was a "formal discussion." *Id.* at 374-75.

On review, the Ninth Circuit reversed the Authority. *Internal Revenue Serv., Fresno Serv. Ctr.* v. *FLRA*, 706 F.2d 1019 (9th Cir. 1983) (*IRS, Fresno* v. *FLRA*). The court held that the meeting was not a formal discussion because: 1) the meeting was informal, noting the special confidentiality concerns associated with the EEO counseling session;[4] and 2) the meeting did not concern a "grievance." With respect to the second ground, the court found that the EEOC procedure is "unrelated to and separate from" the NGP, noting that the parties' collective bargaining agreement excluded discrimination complaints from the NGP. *Id.* at 1024. In this regard, the court limited the term "grievance" as used in section 7114(a)(2)(A) to a grievance filed under the parties' NGP.

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[3]Individuals who believe that they have been discriminated against must first consult with a counselor in an effort to "informally resolve the matter." 29 C.F.R. 1614.105(a) (1999).

[4]During this initial stage of the discrimination complaint process, the EEO counselor is not permitted to reveal the identity of the aggrieved person, absent authorization from the individual seeking counseling. 29 C.F.R. 1614.105(g) (1999).

b. The D.C. Circuit's Decision in *NTEU* v. *FLRA*

After *IRS, Fresno* v. *FLRA*, the Authority adopted the reasoning of the Ninth Circuit and held that the term "grievance" as used in section 7114(a)(2)(A) did not include complaints filed pursuant to alternative statutory procedures, such as proceedings before the MSPB and the EEOC. *Bureau of Gov't Fin. Operations, Headquarters*, 15 FLRA 423, 426-30 (1985) (*BGFO*). The discussion at issue in *BGFO* concerned an appeal before the MSPB.

The D.C. Circuit reversed the Authority. *National Treasury Employees Union* v. *FLRA*, 774 F.2d 1181 (D.C. Cir. 1985) (*NTEU* v. *FLRA*). Relying principally on the broad definition of "grievance" in section 7103(a)(9) of the Statute, the court expressly disagreed with the Ninth Circuit and concluded that the term "grievance" as used in section 7114(a)(2)(A) encompasses more than matters that may be pursued under the NGP and includes complaints filed under alternative statutory procedures. *Id.* at 1185-86, 1188. The court also determined that a broad construction of "grievance" was consistent with section 7121, which relates to grievance procedures. *Id.* at 1186-88.

Citing the reasoning of the D.C. Circuit in *NTEU* v. *FLRA*, the Authority subsequently returned to its view in *Fresno Service Center*. *See Ray Brook*, 29 FLRA at 590. Accordingly, the Authority held that the term "grievance," as used in section 7114(a)(2)(A), encompasses alternative statutory procedures. *Id.*

c. The Tenth Circuit's Decision in *VA, Denver* v. *FLRA*

The Authority's position that a "grievance" within the meaning of section 7114(a)(2)(A) includes alternative statutory procedures was upheld by the Tenth Circuit in

Department of Veterans Affairs v. *FLRA*, 3 F.3d 1386 (10th Cir. 1993) (*VA, Denver* v. *FLRA*). The discussion at issue in *VA, Denver* v. *FLRA* concerned an MSPB appeal. There the court cited with approval the D.C. Circuit's *NTEU* v. *FLRA* decision, *id.* at 1390, and attempted to distinguish *IRS, Fresno* v. *FLRA* by asserting that *IRS, Fresno* turned on the fact that the EEO proceeding was at the counseling stage, *id.* at 1391.

d. The Ninth Circuit's Decision in *VA, Long Beach* v. *FLRA*

Following *IRS, Fresno* v. *FLRA*, but well before deciding the instant case, the Ninth Circuit found that an MSPB appeal was a grievance within the meaning of section 7114(a)(2)(A). *Department of Veterans Affairs Med. Ctr.* v. *FLRA*, 16 F.3d 1526, 1536 (9th Cir. 1994) (*VA, Long Beach* v. *FLRA*). Like the D.C. Circuit in *NTEU* v. *FLRA*, the court began its analysis with the broad statutory definition of grievance. 16 F.3d at 1533.

By finding that "grievance" is not limited to complaints processed through the NGP but also includes complaints processed through alternative statutory procedures, the *VA, Long Beach* v. *FLRA* court created an intra-circuit conflict with and cast doubt on the validity of *IRS, Fresno* v. *FLRA*. Although attempting to distinguish *IRS, Fresno* v. *FLRA*, the court stated in *VA, Long Beach* v. *FLRA* that "we note that the reasoning of the District of Columbia circuit in [*NTEU* v. *FLRA*], rejecting the [*IRS, Fresno* v. *FLRA*] analysis, is more persuasive." 16 F.3d at 1534 n.4.

3. The Ninth Circuit's Decision in the Instant Case

After the Authority found that the agency violated the Statute by not notifying the union of the meeting to discuss the employee's EEO complaint, Luke AFB petitioned the Ninth Circuit for review. Finding the

case controlled by *IRS, Fresno* v. *FLRA*, the court granted the petition for review and denied the Authority's cross-application for enforcement. App. A1-A3. The court held that an EEO complaint was not a grievance because it was filed pursuant to the EEOC's procedures. The court also noted that the parties had excluded discrimination complaints from their NGP. The court did not address *VA, Long Beach* v. *FLRA* or its tension with *IRS, Fresno* v. *FLRA*.

On March 14, 2000, the court denied the Authority's petition for rehearing and petition for rehearing en banc. App. B1.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari to resolve the intra- and inter-circuit conflicts on the issue of whether a union's right to representation during an agency's formal discussion with an employee applies to discussions regarding claims filed pursuant to alternative statutory procedures. The lower courts have disagreed on the question of the union's right to attend formal discussions that relate to these procedures — an issue of exceptional importance to unions, agencies, and employees. As the Department of Justice on behalf of Luke AFB explained to the Ninth Circuit regarding this case, union representation during EEO sessions is a "recurring issue of 'substantial public importance' that is of interest to all components of the Federal Government." Luke Air Force Base's Request for Publication, dated January 10, 2000, App. E2.

This case presents the Court with the opportunity to resolve the current conflict and provide uniform guidance to the federal employment community. By deciding this question, the Court can clarify the

unions' important representational right to attend formal discussions as it relates to alternative statutory procedures.

A. The Decision of the Court Below Conflicts with That of Two Other Circuits and Another Panel Within the Ninth Circuit

1. The Conflict Is Direct

The decision of the court of appeals is in direct conflict with the D.C. Circuit's decision in *NTEU* v. *FLRA* and the Tenth Circuit's decision in *VA, Denver* v. *FLRA*. The decision below was based exclusively on the Ninth Circuit's *IRS, Fresno* v. *FLRA* precedent — a decision with which the D.C. Circuit has expressly disagreed. Specifically rejecting *IRS, Fresno* v. *FLRA*'s conclusion that "the term 'grievance' . . . include[s] only disputes governed by a negotiated grievance procedure," *NTEU* v. *FLRA*, 774 F.2d at 1188, the D.C. Circuit has held that a meeting concerning a statutory appeal to the MSPB concerned a grievance within the meaning of section 7114(a)(2)(A), regardless of availability of the NGP, *id.* at 1185 n.5.

"[G]reatly persuaded by the reasoning of [*NTEU* v. *FLRA*]," the Tenth Circuit has also held that the term "grievance" as used in section 7114(a)(2)(A) encompasses complaints filed under alternative statutory procedures as well as matters pursued through an NGP. *VA, Denver* v. *FLRA*, 3 F.3d at 1390-91. Adopting the reasoning of the D.C. Circuit, the Tenth Circuit found that limiting the reach of "grievance" to the NGP — as the court below did here and in *IRS, Fresno* v. *FLRA* — "is too narrow a reading of [section] 7114(a)(2)(A)." *Id.* at 1391.

The conflict regarding the meaning of "grievance" in section 7114(a)(2)(A) reflects a significant

disagreement over the role of unions in the federal workplace. In *IRS, Fresno* v. *FLRA*, the Ninth Circuit stated that a union's function is limited to the negotiated grievance mechanism and that the union has "no such institutional role in the EEOC process." 706 F.2d at 1025. The D.C. Circuit has rejected this finding, stating that it views "the interest of unions under the [Statute] as potentially far broader." *NTEU* v. *FLRA*, 774 F.2d at 1188. *See also VA, Denver* v. *FLRA*, 3 F.3d at 1390 (section 7114(a)(2)(A) "recognizes that the resolution of an individual employee complaint may have an impact on the rights of other unit employees").

The D.C. Circuit emphasized that regardless of the forum in which an employee opts to bring his complaint, a union has an interest in the fair treatment of unit members and any allegation of unfair treatment triggers that interest. *See NTEU* v. *FLRA*, 774 F.2d at 1188. Further, resolving individual complaints affects other employees, whether that resolution takes place in the NGP or an alternative statutory procedure. For example, a remedy for one employee may result in decreased opportunities for others. *Id.* In addition, determinations with respect to what constitutes an unjust employment action in one case may affect the rights and expectations of other employees in similar circumstances. *Id.* As the D.C. Circuit stated, these effects are present whether the aggrieved employee pursues the matter through the NGP or through an alternative statutory procedure. *Id.*

Not only does the decision in this case conflict with two other circuits, it is also inconsistent with other Ninth Circuit precedent. *VA, Long Beach* v. *FLRA* — where the Ninth Circuit held that an MSPB complaint is a "grievance" — cannot be reconciled with *Luke AFB* v. *FLRA* and *IRS Fresno* v. *FLRA*, which found that an

EEOC complaint is not a "grievance."[5] This inconsistency resulted from the two panels taking a different view of the meaning of grievance in section 7114(a)(2)(A). The court in *VA, Long Beach* v. *FLRA* noted that the Statute defines "grievance" "extremely broadly." 16 F.3d at 1533. This broad definition does not limit "grievance" to matters raised through the parties' NGP, as the Ninth Circuit suggests in *Luke AFB* v. *FLRA* and *IRS, Fresno* v. *FLRA*.

2. The Conflict Must Be Resolved

The conflicting decisions of the various circuits create significant difficulties. First, there is a need for uniformity in construing federal law that regulates federal sector labor-management relations. Such uniformity in the application of statutory rules and procedures has long been recognized by this Court with regard to the private sector. *See Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953).

Further, continuation of this conflict will necessarily proliferate litigation and uncertainty within the federal sector labor relations community, and thereby drain resources of federal agency employers and the unions that represent federal employees, as well as burden the

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[5]The circuit conflict cannot be reconciled by reasoning that *Luke AFB* v. *FLRA* and *IRS, Fresno* v. *FLRA* involved discrimination complaints under the auspices of the EEOC and those at issue in the other cases involved MSPB appeals. First, although *VA, Denver* v. *FLRA* and *NTEU* v. *FLRA* both involved MSPB appeals, the courts' rationale in those cases was not limited to such appeals, but instead applied to alternative statutory procedures in general. *See VA, Denver* v. *FLRA*, 3 F.3d at 1390-91. Second, no court has suggested that there is a principled difference, with respect to the meaning of the statutory term "grievance," between appeals to the MSPB and complaints under EEOC procedures. As such, the fact that a particular case involves either EEOC or MSPB procedures is not a basis for applying the Statute's formal discussion rights differently.

Authority and the courts. These difficulties are in large measure due to the uncertain venue provisions of the Statute. Under section 7123(a), a person aggrieved by a final order of the Authority may "institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). Accordingly, in any case arising outside the geographical jurisdiction of the D.C. Circuit, there will be at least two available venues for resolution of a labor dispute.

When, as here, an agency's offices are located within the geographical jurisdiction of the Ninth Circuit, both the Ninth and D.C. Circuits are potential available venues for judicial determinations. These agencies and the exclusive representatives of employees in such agencies will be unsure of their rights and obligations regarding formal discussions involving alternative statutory procedures because any decision of the Authority will be inconsistent with the precedent of a potential reviewing court.

B. The Court of Appeals Erroneously Determined That EEO Complaints Are Not Grievances for Purposes of Section 7114(a)(2)(A)

In the instant case, the panel relied on *IRS, Fresno* v. *FLRA* and found that complaints brought pursuant to EEOC procedures are not "grievances" within the meaning of section 7114(a)(2)(A). App. A3. In *IRS, Fresno* v. *FLRA*, the Ninth Circuit held that a "grievance," for purposes of section 7114(a)(2)(A), does not encompass complaints brought pursuant to EEOC procedures, because EEOC procedures are "unrelated to and separate from the contractual grievance process." *IRS, Fresno* v. *FLRA*, 706 F.2d at 1024. As demonstrated

below, this excessively narrow interpretation of the Statute's definition of "grievance" is inconsistent with the express terminology, legislative history, and purpose of the provisions of the Statute under consideration.

1. The Express Language of the Statute

Section 7114(a)(2)(A) of the Statute broadly provides for union attendance at meetings concerning "any grievance." To ascertain the scope of the term "grievance" in section 7114(a)(2)(A), the first place to look is the Statute's express definition of "grievance." *See Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted); *In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996) ("[I]n statutes that contain statutory definition sections, it is commonly understood that such definitions establish meaning wherever the terms appear in the same Act.") (citation omitted).

The express language of section 7103(a)(9) provides no basis for limiting the definition of "grievance," as the court below did here, so as to exclude complaints brought pursuant to alternative statutory procedures. To the contrary, the Statute defines "grievance" in the most inclusive terms. Section 7103, the Statute's definition section, provides in relevant part that:

> "grievance" means *any* complaint–
>
> (A) by any employee concerning *any* matter relating to the employment of the employee[.]

5 U.S.C. 7103(a)(9)(A) (emphasis added). Accordingly, the Statute's broad definition of "grievance" encompasses *any* employment-related complaint, regardless of the forum in which the complaint may be pursued. *See AFGE* v. *FLRA*, 865 F.2d at 1286 ("It is understood that a grievance may arise either pursuant

to a statutory procedure or a contractually administered process."). Congress's repeated use of the modifier "any" underscores its intent that the definition be as inclusive as possible. In this case, Ms. Cano's complaint that she was the victim of illegal discrimination by her employing agency is undeniably a "complaint by [an] employee concerning [a] matter relating to [her employment]," *i.e.*, a "grievance" under the Statute's definition.

Section 7121, the Statute's section providing for NGPs, also provides no basis for limiting the definition of "grievance" as the court below did. On the contrary, section 7121 indicates specifically that a "grievance" includes both those complaints filed through the NGP and those filed through alternative statutory procedures. Subsections 7121(d) and (e) provide that "aggrieved employees" affected by illegal discrimination within the jurisdiction of the EEOC, or subject to conduct or performance-based actions within the jurisdiction of the MSPB, may raise these matters under either a statutory procedure or an NGP, but not both. 5 U.S.C. 7121(d), (e). As the D.C. Circuit held with regard to these subsections:

> [I]f the term "grievance" referred only to disputes pursued through [NGPs], § 7121(d) and (e) would not be worded to require an "*aggrieved* employee" (emphasis supplied) to elect to pursue a remedy under either a negotiated procedure or a statutory procedure. An "aggrieved employee" — *i.e.*, one with a grievance — would by definition necessarily pursue his grievance under a negotiated procedure.

NTEU v. *FLRA*, 774 F.2d at 1187.

Section 7121(a)'s reference to subsections 7121(d) and (e) in discussing the scope and exclusivity of NGPs also indicates that a "grievance" includes complaints filed under alternative statutory procedures. Section 7121(a) provides that any collective bargaining agreement shall include procedures for the "settlement of grievances." These procedures, however, are not entirely exclusive. Section 7121(a) states in this regard that an NGP's procedures "shall be the exclusive administrative procedures for resolving grievances which fall within [the NGP's] coverage," "*[e]xcept as provided in subsections (d) [and] (e) . . . of this section*" (emphasis added). Accordingly, this section recognizes that discrimination complaints filed under alternative statutory procedures are in fact "grievances" and provides that this class of grievances may be processed through either a contractual or a statutory procedure. *See NTEU* v. *FLRA*, 774 F.2d at 1187-88 ("[T]he statutory procedures referred to in § 7121(d) and (e) are also procedures for resolving *grievances*.").

Finally, the court below erred when it found relevant the fact that in this case EEO matters were excluded from the scope of the parties' NGP. A particular subject matter may be a grievance for the purpose of a union's "formal discussion" right even though it cannot be processed through the contractual grievance procedure. The language of section 7121(a) fully supports this analysis through the use of the phrase "grievances which fall within [an NGP's] coverage." This wording necessarily means that there may be "grievances" that are outside the NGP's coverage. Any other interpretation would render the phrase meaningless. *See United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative

effect.") (citations omitted). In this case, EEO matters remain grievances for the purpose of section 7114(a)(2)(A) formal discussion rights — such matters just cannot be processed through the NGP.

2. The Legislative History of the Statute

In addition to the Statute's express terms, the Statute's legislative history also supports the Authority's construction of the Statute. Commenting on what was to become the definition of "grievance," the House Report stated that "[i]t should be noted that, although this subsection is virtually all-inclusive in defining 'grievance' section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term." H.R. Rep. No. 95-1403, at 40 (1978). As the D.C. Circuit found, "[t]he only plausible reading of the sentence . . . is that § 7121 ensures that some *grievances* cannot be processed under [an NGP]." *NTEU* v. *FLRA*, 774 F.2d at 1188. By recognizing that some grievances are *excluded* from the NGP, the passage makes clear that the term "grievance" should not be limited to matters covered by an NGP.

3. The Purpose of the Statute's Provisions

Finally, the lower court ignores an important purpose behind the Statute's formal discussion right. As explained by the Tenth Circuit, the Statute, by providing formal discussion rights for discrete "grievances" and not just general personnel policies, "recognizes that the resolution of an individual employee complaint may have an impact on the rights of other unit employees." *VA, Denver* v. *FLRA*, 3 F.3d at 1390. In contrast, here the court below took too narrow a view of the union's role in the workplace, relegating unions to the role of mere grievance-processors.

As this Court has recognized, unions have an important role in eradicating employment discrimination. *See Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 69 (1974) ("[E]limination of discrimination and its vestiges is an appropriate subject of bargaining . . . ."). In finding that a union has no institutional interest in the processing and resolution of an individual's discrimination complaint, the Ninth Circuit ignores the effects that such matters have on the entire bargaining unit. As noted by the *NTEU* v. *FLRA* court, unions have an established interest in how allegations of discrimination are dealt with and resolved, regardless of the forum in which the employee chooses to lodge the complaint. 774 F.2d at 1188.

In sum, the Statute provides a broad definition of "grievance" that includes complaints processed pursuant to alternative statutory procedures that may or may not also be processed through NGPs. The statutory definition controls the term's use in section 7114(a)(2)(A). Therefore, contrary to the conclusion of the court below, a meeting concerning a complaint filed under an alternative statutory procedure, such as the EEO complaint in this case, constitutes a formal discussion within the scope of that section. Moreover, union attendance at such meetings furthers the purpose behind section 7114(a)(2)(A).

Two courts of appeals and one panel of the Ninth Circuit have agreed with the Authority on this issue and rejected the analysis that served as the basis of the decision in the instant case. This Court should grant the petition for certiorari and resolve the conflict among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.[6]

Respectfully submitted,

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

JUDITH A. HAGLEY
Attorney

* Counsel of Record

JUNE 2000

[6]The Solicitor General authorizes the filing of this petition.

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DECEMBER 30, 1999

FILED Dec. 30, 1999, Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUKE AIR FORCE BASE, Arizona Petitioner-Cross Respondent, vs. FEDERAL LABOR RELATIONS AUTHORITY, Respondent-Cross Petitioner, AMERICAN FEDERAL OF GOVERNMENT EMPLOYEES, AFL-CIO (AFGE), Local 1547, Respondent-Intervenor.	)	Nos. 98–71173 98-71347 MEMORANDUM[1]

Petitions for Review of a Decision of the Federal Labor Relations Authority

Argued and Submitted December 8, 1999 San Francisco, California -

Before: WIGGINS, O'SCANNLAIN, and HAWKINS, Circuit Judges

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

American Federation of Government Employees, Local 1547, is the exclusive representative of a bargaining unit at Luke Air Force Base ("Luke"). The collective bargaining agreement between the union and Luke excludes discrimination claims from the grievance procedure provided in the agreement. Tillie Cano, a member of the union's bargaining unit, filed her claims pursuant to Equal Employment Opportunity Commission ("EEOC") regulations rather than the grievance procedure. For the mediation and the investigation scheduled in connection with these complaints, Cano designated Paul King, president of the union, as her personal representative. On January 18, 1995, Cano, King, and representatives from Luke and the Office of Complaint Investigation met for the first time. King left the meeting early. At the end of the first meeting, a second meeting was scheduled for the next day; however, no one from Luke's management attempted to contact King or the rest of the union regarding the second meeting. At the January 19 meeting, Cano signed a settlement agreement without King's presence.

In May and October of 1995, the union filed unfair labor practice charges against Luke before the Office of Administrative Law Judges, part of the Federal Labor Relations Authority ("FLRA"). The Chief Administrative Law Judge found that Luke failed to comply with Section 7114 of the Federal Service Labor-Management Relations Statute ("Labor Statute") because Luke did not give the union notice and an opportunity to be represented at the January 19 meeting.[2] In August 1998, the FLRA adopted the ALJ's conclusion in a

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[2]Section 7114(a) of the Labor Statute provides in relevant part:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance....

5 U.S.C. §7114 (1998).

decision and order. We have jurisdiction under 5 U.S.C. § 7123. We may set aside a decision issued by the FLRA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Department of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994). Because we conclude that the FLRA acted arbitrarily and capriciously in deciding that Luke violated Section 7114 of the Labor Statute, we REVERSE.

In order for the union to possess a right to representation at a meeting, the following elements of Section 7114(a)(2)(A) must exist: There must be (1) a discussion, (2) which is formal, (3) between the representatives of the government employer and the unit employee or her representatives (4) concerning a grievance. *See General Serv. Admin. v. American Fed'n of Gov't Employees*, 48 F.L.R.A. 1348, 1354 (1994). Under *IRS, Fresno Serv. Ctr. v. FLRA*, 706 F.2d 1019, 1024 (9th Cir. 1983), "grievances" within the meaning of Section 7114(a)(2)(A) do not include Cano's complaints because they were brought pursuant to EEOC procedures, which are "discrete and separate from the grievance process to which 5 U.S.C. [§] . . . 7114 [is] directed." The fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure also suggests that these claims are not "grievances." *See id.* Because the January 19 meeting did not concern "grievances" within the meaning of Section 7114, the meeting did not satisfy the fourth element of Section 7114. The union therefore had no right of representation at the meeting. As such, Luke did not violate Section 7114 when it failed to give the union notice of the January 19 meeting.

REVERSED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT'S DENIAL OF THE AUTHORITY'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC, MARCH 14, 2000

FILED Mar. 14, 2000 Cathy A. Catterson, Clerk
U.S. Court of Appeals
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUKE AIR FORCE BASE, Arizona	)	Nos. 98–71173; 98-71347
Petitioner-Cross Respondent,	)	
vs.	)	ORDER
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent-Cross Petitioner,	)	
AMERICAN FEDERAL OF GOVERNMENT EMPLOYEES, AFL-CIO (AFGE), Local 1547,	)	
Respondent-Intervenor.	)	

Before: WIGGINS, O'SCANNLAIN, and HAWKINS, Circuit Judges.

Petitioner's motion for publication is DENIED.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX *C*

DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY IN *LUKE AIR FORCE BASE, ARIZONA AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547*, 54 FLRA 716 (1998)

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LUKE AIR FORCE BASE, ARIZONA
(Respondent)

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1547
(Charging Party)

DE-CA-50519

DECISION AND ORDER
August 13, 1998

Before the Authority: Phyllis N. Segal, Chair; Donald S. Wasserman and Dale Cabaniss, Members.

I. *Statement of the Case*

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent.

The complaint alleges that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by holding a formal discussion with a bargaining unit employee on January 19, 1995, without affording the Union adequate notice and an opportunity to be represented. The Judge found that the Respondent violated the Statute as alleged.

Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings,

conclusions, and recommended Order, except as modified herein.

II. *Background and Judge's Decision*

The facts, set forth in detail in the Judge's decision, are briefly summarized here. A unit employee filed two formal Equal Employment Opportunity (EEO) complaints alleging that she had been retaliated against for having filed a previous EEO complaint against her former supervisor. The Respondent's commander referred the two complaints to the Office of Complaint Investigations (OCI) of the Department of Defense.[1] An investigator from OCI then scheduled a conference with the employee, who designated the Union president as her personal representative.

The initial objective of this conference, as explained by the OCI investigator in a January 5, 1995, memorandum to the employee, was to mediate a settlement between the employee and "a management official designated complete authority to adjust the complaint[s]." General Counsel Exhibit 2 at 2. Formal investigation of the employee's complaints would take place only if mediation failed: "Should mediation not lead to settlement, the formal investigation will begin with [the employee's] testimony immediately following mediation." *Id.* at 1.

Both the employee and the Union president, as the employee's personal representative, met with the OCI investigator on January 18, 1995. Also attending this meeting were an attorney from the Air Force Judge Advocate General's office, who had been assigned to represent the Respondent, and the employee's former

[1]The Defense Department has consolidated the investigation of formal EEO complaints from its components in the OCI, which is part of the Department's Civilian Personnel Management Service.

supervisor. The parties attempted for several hours with the assistance of the OCI investigator to obtain a mediated settlement of the employee's complaints. They failed to do so, and the Respondent's representatives left the meeting toward the end of the day. The OCI investigator then set up her computer and began transcribing the employee's statement. The Union president left before the employee completed her statement and before there was any discussion of the need for the OCI investigator and the employee to meet again. The OCI investigator later told the employee that they would meet again the following day, January 19.

The Union president was not notified of the January 19 meeting, and did not attend. The Respondent's chief EEO counselor was present at this meeting, and at an early point either she or the attorney from the Judge Advocate General's office presented the employee with a proposed settlement agreement. The agreement then became the topic of the meeting. The chief EEO counselor was "in and out of the room" relaying the employee's position to the Judge Advocate General attorney and returning to present the Respondent's position to the employee. *See* Transcript at 125-26, 130-31, 195-99, 233-35, 260-67. After some discussion in that manner, the agreement was modified, and the employee signed it.

The Judge found that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting a meeting on January 19 with the employee that was a discussion, which was formal, between one or more representatives of the Respondent and a bargaining unit employee concerning her formal EEO complaints. He also found that the Respondent failed to provide the Union notice and an opportunity to be represented at the discussion, as required by section 7114(a)(2)(A). The

Judge found no merit to the Respondent's argument that, based on the decision of the U.S. Court of Appeals for the Ninth Circuit in *Internal Revenue Service, Fresno Service Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983) *(IRS, Fresno)*, the employee's EEO complaints were not "grievances" under the Statute. He found that *IRS, Fresno* addressed only informal EEO complaints, not formal complaints such as those in this case.

Further, the Judge found no merit to the Respondent's argument that the employee's right to settle an EEO complaint outweighed the Union's right to be represented at the settlement. He found that argument amounted to "weighing an employee's right to settle a grievance with the Union's right to represent the unit employees" and "would, in effect, strike § 7114(a)(2)(A) from the Statute." Judge's Decision at 11.

The Judge rejected the Respondent's argument that section 574 of the Alternative Dispute Resolution Act (5 U.S.C. § 571, *et seq.*) (ADR Act) precluded the attendance of the Union at the settlement discussions of the formal EEO complaints. He found that the OCI investigator was not a neutral mediator, as envisioned by the ADR Act, and that, in any event, "nothing in the [ADR Act] forbids the Union from being present at the settlement discussions or when settlement was reached." *Id.* at 12. He similarly found that nothing in the regulations or Equal Employment Opportunity Commission (EEOC) management directives governing OCI investigations forbade the Union from being present at settlement discussions of formal EEO complaints.[2]

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[2]The Judge identified these regulations as 29 C.F.R. Part 1614 and the Federal Sector Complaints Processing Manual, EEO Management Directive 110 (EEO MD 110). *See* Judge's Decision at 12.

Under these circumstances, the Judge concluded that the Respondent violated section 7116(a)(1) and (8) of the Statute. As a remedy, he recommended an order directing the Respondent to give the Union advance notice and an opportunity to be represented at "formal discussions with bargaining unit employees concerning mediation or investigation of formal EEO complaints." *Id.* at 13. He also recommended that the Respondent post a notice to all employees.

III. *Positions of the Parties*

A. *The Respondent*

The Respondent acknowledges that, "Under Authority law, the terms 'meeting' and 'discussion', are synonymous." Exceptions at 5. It contends, however, that the January 18 and 19 meeting between the employee and the OCI investigator constituted a "two day informal mediation session" rather than a formal discussion. *Id.* at 4.

In the Respondent's view, this "mediation session" was informal for several reasons. First, the Respondent asserts that "only the employee's first level supervisor attended].]" *Id.* at 5. Second, Respondent asserts that the attorney from the Judge Advocate General's office, whom the Respondent does acknowledge as its representative, was present at the January 18 meeting but was "not in the employee's supervisory chain." *Id.* In this regard, the Respondent asserts that on January 18 the parties "were together only a portion of the time, with the mediator [the OCI investigator] spending a large portion of the time talking with each side individually in caucuses." *Id.* Third, the Respondent asserts that the meeting took place in a room across the hall from the office of the Respondent's chief EEO counselor—"a neutral location outside of the employee's work area." *Id.* Fourth, the Respondent asserts that the

"mediation process" lasted seven and a half hours over a two day period. *Id.*

Fifth, the Respondent asserts that the meeting was called by the OCI investigator "as part of her handling of the case." *Id.* Sixth, the Respondent asserts that the "mediation" had no formal agenda and no notes were taken. *Id.* Seventh, the Respondent asserts that the "mediation" was conducted by mutual consent and was confidential. *Id.*

The Respondent again invokes, as it did before the Judge, the decision of the Ninth Circuit in *IRS, Fresno* to argue that meetings may be found informal when the "regulatory framework" of the EEOC characterizes them that way. Exceptions at 6. The Respondent claims that the Authority reached this same result in *Social Security Administration and Social Security Administration, Field Operations, New York Region*, 16 FLRA 1021 (1984) (*SSA*).

The Respondent excepts to the Judge's determination that the OCI investigator and the Respondent's chief EEO counselor were representatives of management. In its view, the evidence shows that OCI investigators are employees of the Department of Defense and not agents of the installations (such as the Respondent) where they conduct their investigations. The Respondent asserts that the chief EEO counselor is forbidden by the Federal Sector Complaints Processing Manual, EEO Management Directive 110 (EEO MD 110) from serving as an agency representative and is instead "neutral by law."[3] Exceptions at 14. According

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[3]EEO MD 110, Chapter 1. Paragraph IV. provides:

> EEO counselors, EEO officers, and EEO program managers have vital roles in the resolution of discrimination complaints and to operate effectively they must have the confidence of both the agency and the employees. It is inconsistent with their neutral roles for EEO counselors, EEO officers, and EEO program managers to serve as representatives for

to the Respondent, its only representative was the Judge Advocate General attorney who signed the settlement agreement, but who was "not in the employee's supervisory chain." *Id.* at 5.

The Respondent contends that the employee's EEO complaints were not "grievances" within the meaning of section 7114(a)(2)(A) of the Statute. It further asserts that "[t]he EEO complaint process is specifically excluded from the parties' collective bargaining agreement." Exceptions at 9. According to the Respondent, the Union had no right to be present at the "mediation" in this case because that mediation affected only the employee herself, not the bargaining unit as a whole. *Id.* at 9.

Further, the Respondent contends that EEOC regulations make no provision for the presence of an exclusive representative during the processing and settlement of EEO complaints. It asserts that the D.C. Circuit has held that the rights of a complainant outweigh the rights of an exclusive representative where a conflict exists between the two,[4] and that the Authority has also recognized "the supremacy of the EEO complainant's position." *Id.* at 10. According to

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agencies or complainants. Therefore, EEO counselors, EEO officers, and EEO managers cannot serve as representatives for complainants or for agencies in connection with the processing of discrimination complaints. *See generally*, 29 C.F.R. 1614.605(c) (disqualification of representatives for conflict of duties).

[4]The Respondent cites *National Treasury Employees Union v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985) *(NTEU)*. The court in *NTEU* reversed the Authority's decision that the term "grievance" under section 7114(a)(2)(A) excluded statutory appeals. However, in dictum upon which the Respondent relies here, the court noted that "a *direct* conflict between the rights of an exclusive representative under section 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter." *Id.* at 1189, n.12 (emphasis in the original).

the Respondent, the Authority is entitled to no "deference in interpreting the law involving the processing of individual EEO complaints[,]" inasmuch as all authority for doing so rests with the EEOC. *Id.*

Finally the Respondent contends that mediation procedures under the ADR Act are intended to be confidential. According to the Respondent, "[w]hen a third party such as a union which has no business at an *[sic]* mediation . . . is present, confidentiality of the process will be violated." *Id.* at 11. The Respondent argues that "there is no requirement to disclose confidential information such as an EEO settlement agreement to a third party without the consent of the complainant," and maintains that the Authority so held in *Federal Aviation Administration, New York TRACON, Westbury, New York*, 51 FLRA 115 (1995) *(TRACON)*.[5]

B. *The General Counsel*

The General Counsel principally emphasizes that this case concerns a *formal* rather than an informal EEO complaint, and contends that important distinctions—relating chiefly to the confidentiality of the proceedings—exist between the two types of complaints. The General Counsel contends that the Judge correctly distinguished the Ninth Circuit's decision in *IRS, Fresno*, which involved an informal EEO complaint, from this case, which involved a formal complaint. The General Counsel adds that, similarly, EEOC's own regulations establish different rules concerning the settlement of "EEO matters during the precomplaint stage as compared to those matters advanced to the formal stage." Opposition at 5.

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[5]The Authority found in *TRACON*, 51 FLRA at 123, that disclosure of an EEO settlement agreement requested by the union under section 7114(b)(4) of the Statute would violate the Privacy Act.

The General Counsel also maintains that the Union's right to be present at the settlement of the employee's EEO complaints exists independently of whether the ultimate settlement agreement had any effect on other unit employees, and contends that "the record clearly reflects that the settlement discussions which preceded [the agreement] involved topics with potential impact on other employees." *Id.* at 8.

The General Counsel argues that both the OCI investigator and the Respondent's chief EEO counselor, as well as the Judge Advocate General attorney, were agents of the Respondent. According to the General Counsel, the Respondent had, in effect, contracted with OCI for the investigation of EEO complaints filed by the Respondent's employees. The General Counsel asserts that "the Authority has found that even a contractor functions as a 'representative of the agency' when that contractor conducts the agency's business." *Id.* at 9, quoting from *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1013 (1991). The General Counsel maintains that, like the OCI investigator and the Judge Advocate General attorney, the Respondent's chief EEO counselor was also "conducting the Respondent's business by her actions during the meeting[.]" Opposition at 10.

IV. *Analysis and Conclusions*

The January 18 and January 19 sessions were arranged by the OCI investigator to mediate and, if necessary, investigate the employee's EEO complaints. The Union president was present at the January 18 mediation/investigation session, attending as the employee's personal representative. *See* Judge's Decision at 4. The Agency did not provide the Union notice and an opportunity to be represented at the January 19

mediation/investigation session. The complaint concerns only the January 19 session. For the following reasons, we conclude that the January 19 mediation/investigation session of the EEO complaints was a "formal discussion" within the meaning of section 7114(a)(2)(A) of the Statute and, therefore, that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to provide the Union notice and an opportunity to be represented at that mediation/investigation session.[6]

A. *The January 19 Mediation/Investigation Session of the EEO Complaints Constituted a "Formal Discussion" Within the Meaning of Section 7114 (a)(2)(A) of the Statute*

In order for a union to have the right to representation under section 7114(a)(2)(A), all the elements of that section must exist. There must be: (1)

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[6]Neither the Respondent nor the General Counsel presented any arguments that our analysis should be affected by the fact that the events spanned two days and the alleged violation occurred on the second day. Further, there are no arguments that the fact that the Union president attended the first day affects this case. Similarly, the complaint does not allege, and we do not decide, whether the Respondent violated the Statute by failing to provide the Union notice of the January 18 mediation/investigation session.

We note that section 7114(a)(2)(A) of the Statute places the burden on an agency to provide adequate prior notification so that the union may have the opportunity to designate its representatives for the formal discussion. *See, e.g., Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 604-05 (1987). As such, the statutory burden of informing a union about a formal discussion does not shift to a complainant who has chosen a union official as a personal representative under EEO regulations. Thus, the Union president's attendance as the employee's personal representative at the mediation/investigation session on January 18 did not relieve the Agency of its obligation to inform the Union in advance about the formal discussion on January 19. *Id.* at 606.

a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1354 (1994) (*GSA I*).

1. *The January 19 Mediation/Investigation Session of the EEO Complaints Was a Discussion*

It is undisputed that the Respondent engaged in a "discussion" with the employee about her EEO complaints, within the meaning of section 7114(a)(2)(A), and, thus, we will not address this requirement. However, the Respondent argues that this discussion was not "formal" and concerned neither a "grievance" within the meaning of the Statute nor a matter affecting other unit employees. The Respondent additionally argues that neither the OCI investigator nor its chief EEO counselor were "representatives of the agency" for purposes of section 7114(a)(2)(A).

2. *The January 19 Mediation/Investigation Session of the EEO Complaints Was Formal*

In *GSA I*, the Authority held that:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), [the Authority has] advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5)

how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

GSA I, 48 FLRA at 1355. These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. *See F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 (1996) *(Warren)*. Therefore, in determining formality, the Authority considers the totality of the facts and circumstances. *Id.*

The OCI investigator presided at, and the chief EEO counselor facilitated, the January 19 mediation/ investigation session of the EEO complaints. The Respondent disputes the Judge's finding that the OCI investigator and the chief EEO counselor were agents of management on January 19. It asserts that the chief EEO counselor is a "neutral." However, the Respondent does not deny that management was represented at all times by an attorney from the Judge Advocate General's office. The Judge Advocate General attorney participated in the initial settlement discussions of January 18 as well as on January 19. In addition, the Judge Advocate General attorney ultimately drafted and signed the agreement with the employee on January 19. *See* Exceptions at 4.

In view of the concession by the Respondent that management was represented at all times by an attorney from the Judge Advocate General's office, we, therefore, find it unnecessary to address, and do not adopt, the Judge's findings that the OCI investigator and the chief EEO counselor are also "representatives" of the Agency within the meaning of section 7114(a)(2)(A) of the Statute. Similarly, we do not address the Respondent's contention that the chief EEO counselor is a "neutral." In addition, we do not address

the Respondent's contention that the OCI investigator is not a representative of the Agency because of her organizational location.

The Respondent argues that since the Judge Advocate General attorney was not the employee's first level supervisor, the mediation session was not attended by an Agency representative of the sort that would indicate a "formal" meeting. Although there is no doubt that she was not the employee's first level supervisor, it is clear that the Judge Advocate General attorney represented a high level of management. The Judge identified the attorney as "the Chief of Civil Law" in the Judge Advocate General's office. Judge's Decision at 2. The attorney identified herself at the hearing as "chief of adverse actions." Transcript at 120.

In an attempt to support its contention of "informality," the Respondent describes the back and forth nature of the mediation/investigation session. The record does not show that the Judge Advocate General attorney was physically present at the January 19 mediation/investigation session with the employee, and the Judge made no finding as to that point. The attorney testified that she was never in the room with the employee on that day. *See* Transcript at 125. The employee testified that she remembered that the attorney brought the proposed settlement agreement into the room but "didn't say a word to anybody" and then left. *Id.* at 76.

Although the evidence is inconclusive that the employee and the Judge Advocate General attorney ever spoke directly to each other on January 19, they communicated extensively through the chief EEO counselor. The record shows that at that mediation/investigation session, the chief EEO counselor was "in and out of the room" relaying the

employee's position regarding a proposed settlement agreement to the Judge Advocate General attorney and returning to present the Respondent's position to the employee. *See* Transcript at 125-26, 130-31, 195-99, 233-35, 260-67. Moreover, this process ultimately produced a settlement agreement signed by the Judge Advocate General attorney.

Even if they were communicating exclusively through the chief EEO counselor, it is clear that both the employee and the Judge Advocate General attorney were engaged in responding to each other's settlement positions, and that they were no less engaged than if they had been speaking face-to-face—as they had been speaking the previous day.[7] A normal mediation technique is to have people in different rooms with someone going back and forth conducting the negotiation. The Union's interest and right to be represented at face-to-face negotiations of a grievance, *see, e.g., GSA I*, 48 FLRA at 1355-56, applies as well, in our view, to a negotiation conducted through a mediator. Under these circumstances, the Judge Advocate General attorney was effectively present at the January 19 mediation/investigation session. Thus, the nature of the communication during the mediation/investigation session on January 19 does not undermine the overall formality. *See, e.g., Veterans Administration Medical Center, Long Beach California*, 41 FLRA 1370, 1379-80 (1991), (*VAMC, Long Beach*), *enforced*, 16 F.3d 1526 (9th

[7]We find no merit to the Respondent's contention that the Union's right to be present at an OCI-conducted mediation/investigation session "where [the Union] is not the personal representative of the complainant" would interfere with management's internal deliberative process. Exceptions at 14. The Union seeks to be present only at the discussions between the management representative and the employee and not at any intra-management meetings where negotiation strategy or settlement authority is discussed.

Cir. 1994) (an interview conducted by telephone was "formal" within the meaning of section 7114(a)(2)(A)).

The fact that the January 19 mediation/investigation session of the EEO complaints took place outside of the employee's work area indicates that it was formal. The Judge found that it took place "a mile or more away from [the employee's] work site." Judge's Decision at 10. The Respondent does not dispute this finding, but describes the meeting site as "a neutral location outside of the employee's work area." Exceptions at 5. Meetings held outside an employee's immediate work area are associated with formality, while those held in the work area are not. *See, e.g., Marine Corps Logistics Base, Barstow, California*, 45 FLRA 1332, 1335-36 (1992) (*Marine Corps Logistics Base*) (shop floor discussion not formal); *U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 37 FLRA 952 (1990) (meeting held in employee lunchroom formal); *Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II*, 29 FLRA 1205, 1216 (1987) (meeting at supervisor's desk near employee's seat assignment not formal). In view of the fact that the mediation/investigation session was held on the Respondent's premises, it is not clear whether it is properly characterized as having been at a "neutral location," as the Respondent maintains. In any event, even if this location were viewed as "neutral," it does not outweigh the fact that it was an Agency location outside the employee's immediate work area.

The length of the January 19 mediation/investigation session of the EEO complaints similarly indicates that it was formal. The Judge found that the January 19 mediation/investigation session culminating in the settlement agreement lasted three hours. *See* Judge's

Decision at 10. As the Respondent describes it, "[t]he mediation process lasted over a two day period covering a period of seven and a half hours." Exceptions at 5. The Respondent presents no basis, and none is apparent given all the other evidence in the case, for describing a three hour mediation/investigation session — much less a seven and one half hour session extending over two days — as impromptu or spontaneous.

The record shows that an agenda was established for the January 18 and January 19 mediation/investigation sessions of the EEO complaints. The Judge found that "there clearly was a pre-established agenda for the meeting." Judge's Decision at 10. The Respondent asserts that "there was no formal agenda for the informal mediation session." Exceptions at 3, 5. The Authority has relied on a variety of evidence to conclude that a particular meeting had or did not have an "agenda." *See, e.g., Warren*, 52 FLRA at 159 (message received by one military command from another found to be agenda for formal discussion); *Marine Corps Logistics Base*, 45 FLRA at 1336 (no agenda where supervisor "thought through his plans for the meeting," but did so only five or ten minutes in advance); *Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747, 754 (1990) (agenda found where supervisor distributed old and new shift schedules and asked employees to choose new shifts).

Although the Judge does not say precisely what he found to be the "agenda" in this case, the record shows that the OCI investigator sent the employee a memorandum some two weeks prior to the mediation/investigation session. This memorandum referred to the issues in the employee's complaints, explained the general plan of the meeting, and laid out

certain ground rules. *See* General Counsel Exhibit 2. The investigator sent a copy of this memorandum to the Respondent's chief EEO counselor. *See* Respondent Exhibit 12. To the extent that the OCI investigator's memorandum shows that the mediation/investigation session to discuss the employee's EEO complaints was planned in advance and had a set of clearly-defined objectives and procedures that were communicated to all the participants, we find that this memorandum was an "agenda" for the mediation/investigation session.

Although the employee's attendance may not have been mandatory in the sense that she could face discipline for refusing to meet with the OCI investigator, the evidence shows that she had reasonable grounds to conclude that her complaints could be adversely affected if she did not attend. The Judge found that the employee "considered the meeting to be mandatory." Judge's Decision at 4, 10.[8] The Respondent contends that "[t]he meeting was conducted by mutual consent[,]" presumably meaning that it was voluntary. Exceptions at 5. The OCI investigator testified that the employee's attendance was "not mandatory" and that she had never heard of a complainant being disciplined for refusing to speak with an OCI investigator. Transcript at 168-69. However, the OCI investigator's memorandum to the employee, discussed above, states that "[f]ailure to cooperate in the investigation . . . will not stop the investigation. It will, however, result in recommendations based on available information and may be the basis for an

[8]The Judge does not explain how he arrived at this finding. However, when asked at the hearing whether she ever considered not attending the mediation/investigation session with the OCI investigator, the employee testified on direct examination: "No, I thought this was the thing to do . . . [i]t was just like I was supposed to be there." Transcript at 83.

adverse inference concerning the position of the nonresponding party." General Counsel Exhibit 2 at 2. Based on this, we find that attendance by the employee at the January 19 mediation/investigation session of the EEO complaints was, in effect, mandatory. Nevertheless, even if attendance were not mandatory, the other indicia of formality support our conclusion that the session on January 19 was a formal discussion. *See, Warren,* 52 FLRA at 159.

The Judge found that "the meeting resulted in a signed settlement agreement[,] reflecting the results of the meeting." Judge's Decision at 10. The Respondent asserts merely that "no notes [were] taken." Exceptions at 5. The record does not indicate that anyone took notes or minutes during the actual settlement on January 19, but it is unclear whether notes or minutes would have been expected. In her memorandum to the employee, the OCI investigator stated that "[tlhe entire mediation conference is confidential, except for information which I would be required to report by law[,]" and "[a]side from minimal notes and the actual [settlement] agreement, if any, no report or testimony unique to the mediation conference will be included in the discrimination complaint file." General Counsel Exhibit 2 at 2. To the extent that the initial focus of the January 19 mediation/investigation session had shifted from mediation to investigation, however, the record shows that the OCI investigator was in the process of transcribing the employee's statement into her computer when the Respondent presented its settlement offer.

On balance, and considering the totality of the facts and circumstances, we are persuaded that the evidence supports the Judge's conclusion that the January 19 mediation/investigation session of the EEO complaints was a "formal discussion" within the meaning of section

7114(a)(2)(A). *See, e.g., GSA I*, 48 FLRA at 1355-56 (settlement negotiations of an appeal to the Merit Systems Protection Board between an agency and the employee and her private attorney constituted formal discussions within the meaning of section 7114(a)(2)(A) of the Statute).

The Respondent's reliance on the Authority's decision in *SSA*, 16 FLRA at 1033-34, is misplaced. In *SSA*, the Authority adopted a Judge's conclusion that meetings to settle an EEO complaint were not formal. In that case, the Judge viewed as dispositive that the presiding official was a facilitator, attendance was not mandatory, and the manner of the discussion was not confrontational. As explained above, for the purpose of determining whether the discussion was formal, we view the January 19th session as, in effect, mandatory. In any event, to the extent that *SSA* implies that a facilitated discussion in general, or a mediated negotiation in particular, can never be "formal" under section 7114(a)(2)(A) of the Statute, we reject that conclusion. In our view, a union's statutory right to notice and an opportunity to be present during a discussion is not diminished when the discussion between employees and agency representatives is conducted in a nonconfrontational manner through a neutral third party. *SSA* will no longer be followed to the extent it implies that a discussion conducted in this way will never be found "formal" within the meaning of the Statute. We will continue to look at the totality of the circumstances in determining whether a discussion is formal.

We also reject the Respondent's reliance on the Ninth Circuit's decision in *IRS, Fresno* to support its position that meetings may be found informal when the "regulatory framework" of the EEOC characterizes them that way. Exceptions at 6. The Authority's decision in *Marine Corps Logistics Base, Barstow, California*, 52 FLRA 1039 (1997) *(Barstow)* issued after the Judge's

decision in this case. In *Barstow*, the Authority concluded that a meeting, at which management presented an employee with a proposed settlement agreement of a formal EEO complaint, was a formal discussion of a grievance that the union should have been permitted to attend. In reaching this conclusion, the Authority pointed to its earlier decision in *U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York)*, 29 FLRA 584, 589-90 (1987), *affirmed sub nom. American Federation of Government Employees Local 3882 v. FLRA*, 865 F.2d 1283 (D.C. Cir. 1989) *(Ray Brook)*. In *Ray Brook*, the Authority decided to follow the reasoning of the D.C. Circuit in *NTEU* over that of the Ninth Circuit in *IRS, Fresno* and held that a grievance within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal. For the reasons stated in *Barstow*, we reject the Respondent's reliance on *IRS, Fresno*.

3. *The January 19 Mediation/Investigation Session of the EEO Complaints Was Between a Representative of the Agency and a Unit Employee*

As noted, the Respondent concedes that the attorney from the Judge Advocate General's Office was its representative and had settlement authority for purposes of this case. Exceptions at 5. The Respondent asserts that the Judge Advocate General attorney was not a supervisor of the employee. However, nothing in section 7114(a)(2)(A) of the Statute requires that a "representative" be a supervisor. *Cf. VAMC, Long Beach, California*, 41 FLRA at 1379 (undisputed that respondent's attorney who conducted telephone interview was respondent's representative); and *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 39 FLRA 298, 311-12 (1991) (finding respondent "responsible for the acts

and conduct of its agent, regardless of the organizational location of its agent"). Thus, we conclude that the January 19 mediation/investigation session of the EEO complaints was between a "representative" of the Agency and a unit employee within the meaning of section 7114(a)(2)(A) of the Statute.

4. *The January 19 Mediation/Investigation Session of the EEO Complaints Concerned a Grievance*

The Judge correctly concluded that the formal EEO complaints filed by the employee constituted a "grievance" within the meaning of section 7114(a)(2)(A). *See Barstow*, 52 FLRA at 1045-46. We reject the Respondent's assertion that section 7114(a)(2)(A) cannot recognize as a "grievance" any matter that the parties have excluded from their own negotiated grievance procedure. The statutory definition of a grievance is not dependent on the scope of a negotiated grievance procedure. Agencies and unions remain free to exclude from their grievance procedures any matters they choose. This does not preclude matters they exclude from their grievance procedures from being "grievances" under the Statute if they otherwise meet the elements of section 7103(a)(9).[9]

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[9]Section 7103(a)(9) of the Statute provides:

(9) 'grievance' means any complaint—
(A) by any employee concerning any matter relating to the employment of the employee;
(B) by any labor organization concerning any matter relating to the employment of any employee; or
(C) by any employee, labor organization, or agency concerning—
(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

The Respondent's argument that the Union had no right to be present at the "mediation" in this case because that mediation affected only the employee herself, not the bargaining unit as a whole, is also misplaced. Exceptions at 9. Section 7114(a)(2)(A) does not require that a "grievance" manifest some effect on other employees in the bargaining unit before it may become the subject of a formal discussion. *See, e.g., Barstow*, 52 FLRA at 1045-46; *Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 32 FLRA 222, 230 (1988) ("[Section 7114(a)(2)(A) requires that a formal discussion be connected with a grievance of a bargaining unit employee or with any personnel policy or practices or other general conditions of employment affecting bargaining unit employees."). The Authority's determinations under section 7114(a)(2)(A) are "guided by that section's intent and purpose — to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit — viewed in the context of a union's full range of responsibilities under the Statute." *Ray Brook*, 29 FLRA at 589.

Nevertheless, we conclude that the grievance did affect the bargaining unit as a whole. This conclusion is supported by testimony from the employee and from the Respondent's own witnesses about the employee's concern that she not be placed in a job for which other employees may have been competing. *See, e.g.*, Transcript at 205-06, 232, 237. The Respondent concedes that the employee herself insisted on modifying the proposed settlement agreement to provide that it would have no "impact" on other bargaining unit positions. *See* Exceptions at 12. The Respondent consented to this modification and created a new position for the employee. Its present argument

that the settlement discussions had no effect on other unit employees because the discussions resulted in an agreement that other employees would not be affected is without merit. For example, the allocation of a position to the employee would necessarily deprive other employees from bidding on that position.

B. *The Presence of a Union Representative at the January 19 Mediation/Investigation Session of the EEO Complaints Would Not Conflict With EEOC Regulations or the ADR Act*

1. *EEOC regulations*

As the General Counsel points out, the Respondent does not contend that 29 C.F.R. Part 1614 and EEO MD 110 actually prohibit the presence of a union representative at the formal discussion of an employee's EEO complaint. Rather, the Respondent asserts only that those regulations do not provide for the union's presence: "[n]owhere in 29 C.F.R. Part 1614 does that regulation allow for the exclusive representative's presence, unless the exclusive representative is the complainant's designated representative." Exceptions at 9. The fact that 29 C.F.R. Part 1614 does not mention the right of a union to be present at a formal discussion of an EEO complaint does not mean that the union's presence is forbidden or that that regulation necessarily conflicts with the protections of the Statute. *Cf. Barstow*, 52 FLRA at 1046. Indeed, the Respondent points to no such conflict in this case. The Respondent does assert that the Authority is not "entitled to deference in interpreting the law involving the processing of individual EEO complaints." Exceptions at 10. However, in the absence of any apparent inconsistency between section 7114(a)(2)(A) of the Statute and "the law involving the processing of individual EEO complaints[,]" nothing in this case requires the Authority to make such an interpretation.

Id. Further, because we find no conflict between the EEOC regulations and the Statute, it is not necessary to determine whether those regulations would trump the Statute in general, or section 7114(a)(2)(A) in particular.

The Respondent also relies on dictum by the D.C. Circuit in *NTEU*, 774 F.2d at 1189, that Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Again, however, the Respondent identifies no conflict between the rights of the employee in this case and those of the Union or the rest of the bargaining unit. In particular, it does not dispute the Judge's finding that the employee not only never objected to the Union president's presence at the settlement discussions but, "[o]n the contrary, she had wanted him to be present." Judge's Decision at 5, n.5.[10]

2. *Administrative Dispute Resolution Act*

Section 574 of the ADR Act, titled "Confidentiality," deals with circumstances under which certain communications made during dispute resolution proceedings may not be disclosed by the parties or by the neutral outside those proceedings. An exclusive representative that is a "party" to the proceedings would presumably be bound by the nondisclosure provisions of 5 U.S.C. § 574. The focus of section 574 of the ADR Act is on the protection of the confidentiality of alternate dispute resolution proceedings and not on who may attend such proceedings. Thus, the mere presence of a union representative at a dispute

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[10]The Respondent's reliance on *U.S. Government Printing Office*, 23 FLRA 35 (1986) (*GPO*) is misplaced. *GPO* did not involve section 7114(a)(2)(A) of the Statute as here, but, instead, it involved section 7116(a)(1) and (5).

resolution proceeding where all the elements of section 7114(a)(2)(A) were met, in and of itself, would not conflict with those provisions of the ADR Act. Further, because we find no conflict between the ADR Act and the Statute, we need not determine whether the ADR Act, if applicable, would trump the Statute in general, or section 7114(a)(2)(A) in particular.

The Respondent's reliance on such cases as *TRACON*, 51 FLRA 115, in which the Authority found that the Privacy Act precluded the disclosure of an EEO settlement agreement, is misplaced. In contrast to those cases, the Union here has not requested any information and the Respondent has not been charged with refusing to provide any. Further, the fact that section 7114(b)(4) may not require an agency to disclose an EEO settlement agreement to a union does not mean that a union has no right under section 7114(a)(2)(A) to attend the formal discussion of an EEO complaint, whether that discussion results in a settlement agreement or not.

Accordingly, we find that the Respondent has failed to demonstrate that either EEOC regulations or the ADR Act conflicts with section 7114(a)(2)(A) of the Statute or otherwise precludes the Union's right to be represented at the discussion in this case.

C. *Summary*

In sum, we find that the January 19 mediation/investigation session of the EEO complaints was a discussion, which was formal, between a representative of the Respondent and a bargaining unit employee concerning a grievance, within the meaning of section 7114(a)(2)(A) of the Statute. In addition, we find that the Respondent has failed to establish that the presence of a Union representative at the mediation/investigation session would conflict with EEOC regulations or the ADR Act.

Therefore, by holding a formal discussion with a bargaining unit employee without affording the Union notice and an opportunity to be represented at the discussion, as required by section 7114(a)(2)(A), the Respondent violated section 7116(a)(1) and (8) of the Statute.

V. *Order*

Pursuant to section 2423.41(c) of the Authority's Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute,[11] Luke Air Force Base, Arizona shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1547 advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement negotiations pertaining to formal EEO complaints.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured to them by the Federal Service Labor-Management Relations Statute.

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[11]We have modified section 1(a) of the Judge's recommended Order, and the recommended Notice, to be consistent with the Judge's recommendation that the remedial order require the Respondent to provide the Union advance notice and an opportunity to be represented at "formal discussions with bargaining unit employees concerning mediation or investigation of formal EEO complaints." *Id.* at 13. Further, we have modified section 2(a) of the recommended Order, and the recommended Notice, so that the Respondent can designate the person who would provide the Union advance notice and the opportunity to be represented at formal discussions.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Provide the American Federation of Government Employees, Local 1547, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

(b) Post at Luke Air Force Base, Arizona copies of the attached Notice to All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Commander, Luke Air Force Base, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered.

(c) Pursuant to Section 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Denver Region, 1244 Speer Boulevard, Suite 100, Denver Colorado 80204-3581, in writing, within 30 days from the date of this order, as to what steps have been taken to comply.

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NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Luke Air Force Base, Arizona has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify bargaining unit employees that:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 1547 (the Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement negotiations pertaining to formal EEO complaints filed by bargaining unit employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, provide the Union advanced notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

_____

(Activity)

Date:_____ By:_____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provision, they may communicate directly with the Regional Director, Denver Region, 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204-3581, and whose telephone number is: (303) 844-5224.

APPENDIX D

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, 5 U.S.C. 7101-7135 (1994 & Supp. III 1997) AND OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REGULATIONS, 29 C.F.R. pt. 1614 (1999)

§ 7103. Definitions; application

(a) For the purpose of this chapter –

* * * * * * *

(9) "grievance" means any complaint

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

* * * * * * *

§ 7105. Powers and duties of the Authority

(a)

* * * * * * *

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

* * * * * * *

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

* * * * * * *

§ 7114. Representation rights and duties

(a)

* * * * * * *

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment;

* * * * * * *

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * * * * *

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of griev-

ances, including questions of arbitrability. Except as provided in subsections (d), (e) and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(c)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary

action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning -

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection

Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as

a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

TITLE 29—LABOR
CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY—Table of Contents
Subpart A—Agency Program To Promote Equal Employment Opportunity

Sec. 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a) (1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

* * * * * * *

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a com-

plaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

APPENDIX E

LUKE AIR FORCE BASE'S REQUEST FOR PUBLICATION, JANUARY 10, 2000

U.S. Department of Justice
Civil Division, Appellate Staff
601 "D" Street, N.W., Rm: 9146
Washington, D.C. 20530-0001

January 10, 2000

Ms. Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Luke Air Force Base v. Federal Labor Relations Authority, Nos. 98-71173 & 98-71347 (December 30, 1999)

Dear Ms. Catterson:

Pursuant to 9th Cir. R. 36-4, petitioner Luke Air Force Base writes to request publication of the unpublished disposition of the above-captioned case.

This decision meets this Court's "Criteria for Publication" in 9th Cir. Rule 36-2 in the following respects. Although this Court recognized that its earlier decision in *IRS Fresno Service Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983), applied to this case, the FLRA had attempted to distinguish *Fresno* by limiting *Fresno's* application only to informal EEO precomplaints. This decision "clarifies" (Rule 36-2(a)) that the analysis of this Circuit's decision in *IRS Fresno* is applicable to formal EEO complaints as well as informal EEO complaints. Publication would also be

beneficial to the public as well because the FLRA's website states that union representation is permitted at EEO mediation sessions. See http://www.flra.gov at http://www.flra.gov.gc/gc_eeo1.html:FLRA General Counsel's Guidance on EEO Matters, Part III—A Union's Right to be Represented at Meetings Involving EEO Matters. A copy of the relevant pages is attached. At least as to this Circuit, this is not the case. Union representation at government EEO mediation sessions is a recurring issue of "substantial public importance" that is of interest to all components of the Federal Government. See 9th Cir. Rule 36-2(d). Finally, publication is also appropriate pursuant to 9th Cir. Rule 36-2(e) because this Court's decision reverses the FLRA's published opinion in *Luke Air Force Base and American Federation of Government Employees*, 54 FLRA No. 75 (1998).

Under the circumstances, we respectfully request redesignation of the unpublished disposition as an Opinion.

We enclose copies of this letter for distribution to the panel (Judges Wiggins, O'Scannlain, and Hawkins). Thank you very much for your attention to this matter.

Sincerely,
Sandra Wien Simon
Counsel for Petitioner Luke Air Force Base

Enclosure

CERTIFICATE OF SERVICE

I certify that on the 10th day of January, 2000 I caused the foregoing letter to be served by first-class mail, postage prepaid, upon the following counsel:

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Involving the union in the settlement process may alleviate any need to bargain over changes that result from an EEO settlement agreement. In essence, this is a form of predecisional involvement where the union may present its interests as an institution when the settlement involves a matter over which there would otherwise be a duty to bargain.

(2) The agency keeps the union informed of settlement progress and attempts to satisfy the union's institutional interests in the settlement agreement in the same manner as management interests are satisfied.

Another strategy to avoid disputes over changes in conditions of employment required by settlement of an EEO dispute or alleged violations of a contract by terms in an EEO settlement is for an agency to provide the union with an opportunity to review any proposed settlement before it is finalized. Under this strategy, the union would be afforded the same opportunity that other entities (e.g. other management components) are afforded which have an interest in the settlement. Allowing the union the opportunity to review proposed settlements and explain its institutional interests prior to finalization could result in avoiding the need to negotiate over any changes in bargainable matters as a result of the settlement or could allow the settlement agreement to be modified so that there is no bargaining or contract violation.

(3) The agency gives notice to the union and bargains prior to implementation of any settlement, and where necessary, provides in the settlement that implementation is dependent upon fulfilling the agency's statutory bargaining obligation to the union.

A third strategy to avoid unfair labor practices is for an

agency to give a union notice of any changes called for by a settlement agreement and fulfill the bargaining obligation prior to implementation of those changes. Agencies may choose to incorporate notice in the settlement agreement that the settlement will be implemented in accordance with law, which includes bargaining under the Statute.

(4) Clarify the role of a union official representing an employee.

Sometimes an employee is represented by a union official as his/her personal representative during the processing of an EEO claim. In these situations, the union official may be serving as a personal representative and may also be serving as a representative of the union in his/her institutional capacity as a result of a contract right or the right of a union to be represented at a formal discussion. Parties should clarify the role of the union official and whether that official can bind the union with respect to any statutory obligations that may arise from a settlement agreement.

PART III

A UNION'S RIGHT TO BE REPRESENTED AT MEETINGS INVOLVING EEO MATTERS

Q. #1: When does a union have a right to be represented at a meeting between an agency representative and an employee concerning an EEO dispute?

A union has a right to be represented at a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute, even if the matter discussed concerns an

EEO complaint being processed as part of an EEO proceeding.

Q. #2: Is a mediation session of a formal EEO complaint a formal discussion?

The Authority has held that a mediation/investigation session to resolve formal EEO complaints may be a statutory formal discussion where an exclusive representative has the right to be represented and actively participate. The Authority analyzed the case using the same decisional analysis that it uses for all formal discussion allegations, holding that "a union's statutory right to notice and an opportunity to be present during a discussion is not diminished when the discussion between employees and agency representatives is conducted in a nonconfrontational manner through a neutral third party." The Authority also reaffirmed its position that a grievance within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal, such as a formal EEO complaint.

Q. #3: When processing an EEO complaint who qualifies as a "representative of the agency" for formal discussion purposes?

I am of the view that an agency should not be permitted to avoid its labor relations obligations simply by contracting out EEO case processing actions which involve bargaining unit employees. Thus, outside investigators and mediators in EEO proceedings, in my view, can be representatives of an agency for section 7114(a)(2)(A) formal discussion purposes. Further, in my view, EEO Directors and counselors who are not in a bargaining unit can be considered to be an agency's representative for formal discussion purposes. However, it is unclear whether EEO counselors that

perform the counselor function as a collateral duty and are bargaining unit employees can ever be a representative of an agency for formal discussion purposes. I have advised Regional Directors to submit this issue for casehandling advice if an investigation of an unfair labor practice charge establishes that all the other elements of a formal discussion have been established.

Q. #4: Can a meeting concerning an informal EEO complaint ever constitute a formal discussion where the union has a right to be represented?

An informal EEO complaint, unlike a formal EEO complaint, does not constitute a grievance for section 7114(a)(2)(A) formal discussion purposes. It is unclear, however, if a meeting between a representative of an agency and an employee that is formal in nature and that concerns a personal policy or practice or general condition of employment can be a formal discussion under the Statute if the discussion takes place as part of the processing an informal EEO complaint. I have advised the Regional Directors to submit this issue for casehandling advice should it arise.

Q. #5: How can agencies and unions avoid disputes over whether a union has a right to be represented at meetings concerning EEO disputes?

In my view, the most effective means to avoid disputes over representation at formal discussions involving the mediation and/or processing of EEO complaints is for the agency and the union to work together in establishing their ADR program and EEO case processing procedures. Parties could avoid most disagreements and misunderstandings about the application of these statutory rights by jointly

establishing an ADR program and EEO processes that satisfy the institutional interests of the agency and the union, as well as respecting an individual's right to file, and have processed, an EEO complaint.

Q. #6: Can the statutory right to representation at an investigatory examination apply to processing an EEO dispute?

Supreme Court, U.S.
FILED
AUG 4 2000
CLERK

No. 99-1939

In the Supreme Court of the United States

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

LUKE AIR FORCE BASE, ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a union has a statutory right to be represented at a mediation session between a federal government agency and a bargaining unit employee concerning that employee's discrimination complaint, which was filed pursuant to the Equal Employment Opportunity Commission procedures on a subject expressly omitted from the collective bargaining agreement.

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FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported. The decision and order of the Federal Labor Relations Authority (Pet. App. C1-C29) is reported at 54 F.L.R.A. 716.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1999. A petition for rehearing was denied on March 14, 2000 (Pet. App. B1). The petition for a writ of certiorari was filed on June 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant portions of the Equal Employment Opportunity Commission's regulations, 29 C.F.R. Pt. 1614, are reproduced in App. 1a-8a, *infra*. The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. IV 1998) are reproduced in Pet. App. D1-D7.

STATEMENT

1. This case concerns whether a union's statutory right to attend any formal discussion between a federal agency employer and a bargaining unit employee concerning any grievance includes a right to attend mediation of an employee's discrimination complaint filed pursuant to procedures established by the Equal Employment Opportunity Commission (EEOC). Resolution of that issue requires consideration of two federal statutory schemes.

a. The 1972 amendments to Title VII of the Civil Rights Act of 1964 extended the coverage of that Act to include the employment practices of the federal government.[1] Litigation is a necessary component of that enforcement scheme. Congress also intended to achieve its statutory goal of eliminating discrimination through the process of voluntary conciliation and settlement of claims of discrimination so that litigation could be avoided. In 1978, the President transferred authority for enforcing and administering the provisions of the Civil Rights Act of 1964 in the federal sector from the Civil Service Commission to the EEOC, citing the EEOC's "considerable expertise in the field of employment discrimination." See Reorg. Plan No. 1

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[1] Pub. L. No. 92-261, § 11, 86 Stat. 111.

of 1978, 43 Fed. Reg. 19,807 (1978), *reprinted in* 42 U.S.C. 2000e-4 (1994 & Supp. IV 1998), *and in* 92 Stat. 3781.

Under the federal government Equal Employment Opportunity (EEO) program, agencies are responsible for investigating complaints filed against them by their employees. See 29 C.F.R. 1614.108(a). The EEOC regulations encourage settlement of EEO cases. See, *e.g.*, 29 C.F.R. 1614.108(b) (providing, in pertinent part, that "[a]gencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints"); 29 C.F.R. 1614.603 (providing that "[e]ach agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage"). See generally 29 C.F.R. Pt. 1614.

EEOC regulations also address the effect of a collective bargaining agreement on the processing of discrimination complaints, both when the agreement permits such complaints to be raised in a negotiated grievance procedure, and when it does not. When a collective bargaining agreement permits allegations of discrimination to be raised in the grievance procedure, a person filing a complaint or grievance "must elect to raise the matter under either part 1614 [*i.e.*, the EEOC process] or the negotiated grievance procedure, but not both." 29 C.F.R. 1614.301(a). But "[w]hen a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under [EEOC regulations, 29 C.F.R. Pt. 1614]." 29 C.F.R. 1614.301(b).

Within the Department of Defense, the EEO complaint investigation function is performed by its Office of Complaint Investigation (OCI), which is part of its Civilian Personnel Management Service. Pet. App. C2. In addition to investigating EEO complaints, OCI investigators use mediation to assist the parties in resolving cases. The OCI is within the Department of Defense, and is independent from, and not under the control of, the United States Air Force.

b. The Federal Service Labor-Management Relations Statute (Labor Statute), Pub. L. No. 95-454, Tit. VII, 92 Stat. 1191, codified as Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7101 *et seq.*, governs collective bargaining in the federal sector. The Labor Statute requires that any collective bargaining agreement covered by the statute must contain a grievance procedure to address specified employee complaints. 5 U.S.C. 7121(a)(1). However, the parties can exclude any subject from the coverage of the collective bargaining agreement. 5 U.S.C. 7121(a)(2). Section 7114(a)(2)(A) provides that a union shall be given the opportunity to be represented at any "formal discussion" between representatives of the agency and any employees in the bargaining unit concerning "any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. 7114(a)(2)(A). This case concerns whether the term "any grievance" includes an EEO complaint that is expressly excluded from the collective bargaining agreement and for which a statutory procedure exists under the auspices of the EEOC.

2. Tillie Cano, a member of the bargaining unit of employees at respondent Luke Air Force Base (Luke AFB), Arizona, filed two formal EEO complaints pursuant to 29 C.F.R. Pt. 1614, alleging that she had been

retaliated against for having filed a previous EEO complaint against her former supervisor. Pet. App. A2. She did not file any complaints of discrimination pursuant to the collective bargaining agreement or the grievance procedure therein. The applicable collective bargaining agreement between the union and Luke AFB explicitly excluded claims of discrimination from the grievance procedure. *Id.* at A3.[2]

The Department of Defense OCI conducted an investigation of Cano's EEO complaints. The OCI investigator sent Cano a memorandum informing her that OCI would be conducting an on-site investigation of the EEO complaints beginning on the afternoon of January 18, 1995. The memorandum stated that there would be a mediation conference and if mediation failed, a formal investigation would follow immediately thereafter. Subsequently, Cano designated Paul King, the president of the union, as her personal representative for this meeting. Pet. App. C2.

On January 18, 1995, Cano, King, and the OCI investigator met with representatives of respondent as scheduled. Pet. App. C2. King attended as Cano's personal representative and not as a representative of the union.[3] King left the meeting before it ended. After he left, Cano and the OCI investigator continued their discussion and agreed to resume the meeting the next day. *Id.* at C3. The next afternoon, January 19, 1995

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[2] C.A. E.R. 11 ("Section B 1. Excluded from coverage under this grievance procedure are matters concerning: * * * f. Equal Employment Opportunity complaints involving an allegation of discrimination.").

[3] Section 1614.605(a) provides that "[a]t any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice."

(January 19th meeting), the OCI investigator and Cano met to continue their discussion of the EEO complaints. Neither Cano nor management advised King or the union of that meeting, at which the parties agreed to a settlement of the EEO complaints and signed an agreement to that effect. *Ibid.* The settlement agreement provided that Cano's reassignment would not affect other positions in the work unit. C.A. E.R. 17-18. Cano also wrote in the agreement that "I elect to sign this agreement without the presence of my representative." *Id.* at 18.

3. In May and October, 1995, the union filed unfair labor practice charges alleging that respondent violated the Labor Statute by failing to give the union the opportunity to be represented at the January 19th meeting at which Cano and respondent mediated and settled her EEO complaints. Pet. App. A2. After a hearing, the ALJ held that respondent failed to comply with Section 7114 of the Labor Statute because it did not give the union notice and an opportunity to be represented at the January 19th meeting. *Ibid.* The ALJ distinguished the Ninth Circuit's decision in *IRS, Fresno Service Center* v. *FLRA*, 706 F.2d 1019 (1983) (*IRS, Fresno*), on the ground that *IRS, Fresno* addressed only informal EEO complaints, not formal complaints such as those in this case. Pet. App. C4.

Respondent filed exceptions to the ALJ's decision with the FLRA. The FLRA concluded that the January 19th meeting on the EEO complaints was a "formal discussion" within the meaning of Section 7114(a)(2)(A) of the Labor Statute and that respondent violated Section 7116(a)(1) and (8) of the Labor Statute by failing to provide the union with notice and an opportunity to be represented at that session. Pet. App. C10. The FLRA, like the ALJ, distinguished *IRS,*

Fresno, *id.* at C19, and instead adopted the reasoning of the District of Columbia Circuit in *National Treasury Employees Union* v. *FLRA*, 774 F.2d 1181 (1985) (*NTEU*). That case held that a "grievance" within the meaning of Section 7114(a)(2)(A) can encompass a dispute subject to resolution under a statute other than the Labor Statute. *NTEU* involved a statutory procedure of the Merit System Protection Board for employee discipline. *Ibid.* Drawing an analogy between the MSPB procedures at issue there and the EEO procedures at issue here, the FLRA concluded that the formal EEO complaint constituted a "grievance" within the meaning of Section 7114(a)(2)(A). Pet. App. C21. The FLRA also rejected respondent's assertion that the term "grievance" in Section 7114 does not include those matters excluded by the parties from their own negotiated grievance procedure, such as the EEO complaint at issue here. The FLRA determined that the statutory definition of a grievance is not dependent on the scope of a negotiated grievance procedure. *Ibid.* The FLRA also determined that the presence of a union representative at the January 19th meeting on the EEO complaints would not conflict with EEOC regulations. Pet. App. C23-C25.

4. In an unpublished opinion, the court of appeals reversed the FLRA. Pet. App. A1-A3. The court concluded that the FLRA acted arbitrarily and capriciously in deciding that respondent violated Section 7114 of the Labor Statute. *Id.* at A3. Applying *IRS, Fresno*, the court held that Cano's complaints were not "grievances" within the meaning of Section 7114(a)(2) of the Labor Statute because they were "brought pursuant to EEOC procedures, which are 'discrete and separate from the grievance process to which 5 U.S.C.

[§] * * * 7114 [is] directed.'" *Ibid.* (quoting *IRS, Fresno*, 706 F.2d at 1024). Moreover, the court noted that the fact that the collective bargaining agreement "explicitly excludes discrimination claims from the grievance procedure also suggests that these are not 'grievances.'" *Ibid.* Thus, the court determined that, because the January 19th meeting did not concern a "grievance" within the meaning of Section 7114, the union had no right of representation at the meeting. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Complaints brought pursuant to EEO procedures are not "grievances" within the meaning of Section 7114(a)(2)(A). See Pet. App. A3. Although 5 U.S.C. 7103(a)(9) defines a "grievance" as "any complaint * * * by an employee concerning any matter relating to the employment of the employee," that definition does not extend to EEO complaints. Section 7121(d) provides that "[a]n aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title [the EEO provisions that apply anti-discrimination statutes to federal employment] which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both." 5 U.S.C. 7121(d). Thus, if the collective bargaining agreement includes a provision for the resolution of EEO grievances, the employee may choose whether to use the bargained-for procedures (complete with union representation) or the EEOC procedures

(which do not provide for union representation). But where, as here, the collective bargaining agreement does not provide a procedure for the resolution of EEO complaints, the employee may only use the statutory procedures provided for by 5 U.S.C. 2302 (1994 & Supp. IV 1998).

b. The legislative history behind Section 7103(a)(9) provides direct support for that reading:

> Subsection (a)(9) of Section 7103 defines "grievance" to mean any complaint by any agency, labor organization, or employee concerning: (1) any matter relating to the employment of such person with an agency; or (2) the effect or interpretation, or claim of breach, of a collective bargaining agreement; or (3) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. It should be noted that, although this subsection is virtually all-inclusive in defining "grievance[,"] *section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term.*

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978) (emphasis added). Thus, the meaning of the term "grievance" under Section 7103(a)(9) is limited by the exclusion of certain subjects—such as EEO complaints —that are excluded from the grievance procedures pursuant to Section 7121(d).

c. In *IRS, Fresno*, the Ninth Circuit explained the rationale for why EEO matters are not part of the regulatory scheme addressed by the Labor Statute:

> [T]he EEOC procedures involved in this case are not controlled by 5 U.S.C. § 7114(a)(2)(A) because they are discrete and separate from the grievance

process to which 5 U.S.C. §§ 7103 and 7114 are directed.

> The union is granted representation rights under 5 U.S.C. § 7114 because of its status as exclusive bargaining representative. As exclusive representative, the union has responsibility for administering the collective bargaining agreement and has an obvious interest in being present when a dispute governed by the grievance procedure it negotiated is discussed or resolved. However, *the EEOC procedure is unrelated to and separate from the contractual grievance process.* * * * [The EEO] meeting did not involve any aspect of the collective bargaining agreement or representation of [the employee's] contractual rights.

706 F.2d at 1024-1025 (emphasis added). The court further explained that the "union's interest in the statutory EEOC procedure is not the same as its interest in the contractual grievance process." *Id.* at 1025. Although the union has "duties and obligations" under the collective bargaining agreement, "it has no such institutional role in the EEOC process." *Ibid.* Thus, the court concluded that "there is no reason [the union] should have the same rights in the EEOC procedure as it does in the contractual grievance process" and held that the EEO discrimination claim was not a "grievance" within the meaning of 5 U.S.C. 7114(a)(2)(A). 706 F.2d at 1025.

That reasoning finds further support in the purposes underlying the collective-bargaining process established in the Labor Statute. After a labor union has been elected by a majority to represent a bargaining unit of federal employees, it is "accorded exclusive recognition" giving it the right "to act for, and negoti-

ate collective bargaining agreements covering, all employees in the unit." 5 U.S.C. 7114(a)(1). As the employees' exclusive representative, the union enters into negotiations and reaches a collective bargaining agreement with the employer. A central feature of the collective bargaining agreement will be its grievance resolution procedures. 5 U.S.C. 7121 (1994 & Supp. IV 1998). For those matters that labor and management agree to cover in their collective bargaining agreement, the contractual grievance procedures "shall be the exclusive administrative procedures for resolving grievances." 5 U.S.C. 7121(a)(1).

As 5 U.S.C. 7121(d) makes clear, however, Congress regarded certain statutory rights enjoyed by federal employees as so important that they cannot be negotiated away by the exclusive bargaining representative. The collective bargaining agreement is prohibited by law from giving the union exclusive powers with respect to allegations of unlawful discrimination. Even if the agreement authorizes the employee to pursue the matter through the contractual grievance process, the option to complain through the EEO procedures will still remain. 5 U.S.C. 7121(d). Those are "two different and distinct mechanisms." *IRS, Fresno*, 706 F.2d at 1025. But once the employee selects the statutory procedure—or the collective bargaining agreement itself omits any procedure for addressing EEO complaints—the provisions of the Labor Statute are not applicable. Cf. *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983).

d. Petitioner argues (Pet. 19), however, that the Labor Statute provides a "broad definition" of "grievance" that encompasses complaints processed through means other than the negotiated grievance procedure, including the EEO procedures. Petitioner mistakenly

presumes that Congress intended Section 7114(a)(2)(A) to modify the exclusive scheme created by Title VII and the EEOC's accompanying regulations for individual claims of discrimination in employment. If Congress had wanted to amend the scheme created by Title VII and the EEOC's accompanying regulations—under which employees may choose their own representative pursuant to 29 C.F.R. 1614.605(a)—by according unions an independent right to attend often confidential proceedings, it would have done so directly. See, *e.g.*, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative history] * * * while contemplating an important and controversial change in existing law is unlikely.").

2. Contrary to petitioner's assertion (Pet. 11-13), there is no conflict in the circuits on this issue. The court of appeals' decisions cited by petitioner concern proceedings involving a different statutory scheme—Merit Systems Protection Board (MSPB) proceedings—and not EEO proceedings. Only the Ninth Circuit has directly confronted the issue of whether the union's right of representation applies to EEO proceedings. In both this case and *IRS, Fresno*, the court held that it did not.

Nevertheless, petitioner suggests that a conflict exists between the Ninth Circuit and both the Tenth and D.C. Circuits "on the issue of whether a union's right to representation during an agency's formal discussion with an employee applies to discussions regarding claims filed pursuant to alternative statutory procedures." Pet. 10. Petitioner contends that "the circuit conflict cannot be reconciled by reasoning that [the decision below] and *IRS, Fresno* * * * involved discrimination complaints under the auspices of the EEOC and those at issue in the other cases involved

MSPB appeals." *Id.* at 13 n.5. Both *NTEU* and *Department of Veterans Affairs* v. *FLRA*, 3 F.3d 1386 (10th Cir. 1993), held that the term "grievance" in Section 7114(a)(2)(A) includes complaints filed pursuant to MSPB procedures. Perhaps the clearest sign that petitioner is mistaken in asserting a conflict is that the Ninth Circuit itself has also agreed with the D.C. and Tenth Circuits that the union's right of representation applies to discussions regarding claims filed pursuant to MSPB procedures. *Department of Veterans Affairs Med. Ctr.* v. *FLRA*, 16 F.3d 1526 (9th Cir. 1994) (*Veterans Affairs*).

The issue of whether the union's right to be represented at a formal discussion of a grievance applies to MSPB procedures presents significantly different considerations from whether the union has the right to be represented at EEO proceedings. Only the Ninth and D.C. Circuits have considered the relationship between these two issues, and both have concluded that the union's rights as to EEO proceedings warrant separate analysis. The Ninth Circuit described the question concerning the union's right to be represented at MSPB proceedings and EEO proceedings as "entirely different." *Veterans Affairs*, 16 F.3d at 1534. In dictum the D.C. Circuit noted in *NTEU* that "Title VII * * * provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. * * * Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter." 774 F.2d at 1189 n.12.

The MSPB and its procedures were enacted pursuant to the same Act of Congress that contains the Labor

Statute and its Section 7114—the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. In contrast, the EEO procedures at issue in this case are mandated under an entirely separate law, Title VII of the Civil Rights Act of 1964. The MSPB's origins in the CSRA, the same statute in which Congress recognized the right of federal employees to bargain collectively, reflects the substantial relation between the concerns that Congress intended both measures to address: reforming the federal civil service. That same nexus, however, does not exist between the purposes of the Labor Statute and EEO procedures, which were established pursuant to Title VII to eradicate discrimination.

3. Petitioner further contends that the Ninth Circuit's recognition in *Veterans Affairs* that the union's right might apply to non-negotiated procedures represents an "intra-circuit split." Pet. 10, 12-13. Even were that holding to constitute an intra-circuit conflict—and for the foregoing reasons it does not—such a conflict would be properly resolved by the Ninth Circuit itself and not by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, petitioner's characterization is incorrect because the *Veterans Affairs* court expressly distinguished *IRS, Fresno*, and the decision below is consistent with *Veterans Affairs*. In *Veterans Affairs*, the court held that telephone interviews of union members who were potential witnesses at a MSPB hearing were formal discussions of grievances covered by Section 7114(a)(2)(A). 16 F.3d at 1528-1529. The court, however, specifically distinguished EEO proceedings from those before the MSPB, and reaffirmed its holding in *IRS, Fresno*. The court in *Veterans Affairs* noted that *IRS, Fresno* concerned whether the "protections of the [Labor] Statute

apply to proceedings conducted by the EEOC." *Id.* at 1534. The *Veterans Affairs* court determined that "they do not" because "an employee's rights as to EEOC proceedings are established by the EEO statute and accompanying regulations." *Ibid.* The issue in this case, therefore, is not whether a union's right to representation applies to discussions regarding claims filed pursuant to a procedure other than the negotiated procedure, but more specifically, whether the union's right under the Labor Statute to be represented at "any formal discussion" concerning "any grievance" applies to the procedures that Congress and the EEOC established for EEO complaints.

4. Petitioner further argues that resolution of individual discrimination complaints affects the "entire bargaining unit" and that "unions have an established interest in how allegations of discrimination are dealt with and resolved." Pet. 19. The union's interest in the outcome of EEO proceedings, however, is limited. Moreover, the settlement agreement in this case included a provision stating that the appellant's reassignment would not have an impact on other positions in the workplace. C.A. E.R. 17-18. Although there was no effect on the bargaining unit as to this particular settlement, if there had been, the agency would have been obliged to bargain with the union over the impact of a settlement agreement to the extent that it affected the bargaining unit. See 5 U.S.C. 7106(b)(2) and (3).

The issue of whether the union's right under the Labor Statute applies to EEO proceedings is also affected by the EEO confidentiality safeguards. The EEOC has never adopted a rule allowing for the union's presence at mediations and, indeed, has adopted a

practice to the contrary.[4] Moreover, in contrast to MSPB hearings that are presumptively "open to the public" (5 C.F.R. 1201.52), EEO hearings are "closed to the public" (29 C.F.R. 1614.109(c)). Although the identity of the complainant may be public, discrimination complaints present issues under the Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. IV 1998), and other concerns[5] that require the agency to keep the substance of the actual complaint and the investigation confidential.[6]

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[4] The EEOC recently issued a final rule, effective November 9, 1999, revising the EEOC's federal sector complaint processing regulations found at 29 C.F.R. Pt. 1614. The rule states, in pertinent part, that "[a]gencies will be required to establish or make available an [Alternate Dispute Resolution (ADR)] program. The ADR program must be available during both the precomplaint process and the formal complaint process." 64 Fed. Reg. 37,644 (1999). The EEOC further stated that, "[t]he Commission's intention in requiring an ADR program is that agencies establish informal processes to resolve claims. Thus any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act." *Id.* at 37,645.

[5] Discrimination complaints often involve very sensitive issues such as disabilities or sexual harassment. The law is sensitive to the need for confidentiality in this area. See 42 U.S.C. 2000e-5(b), 2000e-8(e). A requirement that the union be represented at mediations or hearings concerning such complaints may chill those proceedings. Even though the union's interest may not actually conflict with the employee's interest in such cases, just the presence of the union might be sufficient to make an employee hesitate to file or pursue valid, but sensitive, EEO complaints.

[6] The FLRA's position in this case is thus somewhat inconsistent with its prior acknowledgment that "both Congress and the courts have recognized the privacy interests of employees who file discrimination complaints." *Federal Aviation Admin., N.Y., TRACON*, 51 F.L.R.A. 115, 121 (1995) (*TRACON*). In *TRACON*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2000

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the FLRA noted that although EEOC regulations concerning discrimination involving Federal agencies do not contain express confidentiality provisions, "'Congress' concern . . . that . . . confidentiality is important in achieving voluntary compliance with the goals of Title VII' has been found relevant in the Federal sector." *Id.* at 120-121 (quoting *IRS, Fresno*, 706 F.2d at 1024).

APPENDIX

1. 29 C.F.R. 1614.108 [as of July 1, 1999] states as follows:

§ 1614.108 Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or

affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

2. 29 C.F.R. 1614.109(c) [as of July 1, 1999] states in relevant part:

§ 1614.109 Hearings.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

3. 29 C.F.R. 1614.301 [as of July 1, 1999] states as follows:

§ 1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance proedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart

D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

4. 29 C.F.R. 1614.603 [as of July 1, 1999] states as follows:

§ 1614.603 Voluntary settlement attempts.

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in

writing and signed by both parties and shall identify the claims resolved.

5. 29 C.F.R. 1614.605 [as of July 1, 1999] states as follows:

§ 1614.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherzwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of documents and decisions on the complainant shall be made on the attorney and not on the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

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No. 99-1939

In the Supreme Court of the United States

OCTOBER TERM, 2000

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

LUKE AIR FORCE BASE, ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent Luke AFB argues that the decision of the court of appeals does not warrant review by this Court. In support of this assertion, Luke AFB claims that there is no disagreement among the courts of appeals and that, in any event, the decision of the court below is correct. Neither of these assertions has merit.

I. The Decision of the Court Below Directly Conflicts with Those of the District of Columbia and Tenth Circuits

Contrary to Luke AFB's assertion (Brief for the Respondent in Opposition (Opp.) 12), the courts are in conflict on the basic question that prompts this case. Two courts of appeals — the D.C. and Tenth Circuits — have found that the term "grievance," as used in section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101–7135 (1994 & Supp. IV 1998) (Statute), means "any complaint," to include

matters pursued through alternative statutory procedures. These findings are consistent with the Statute's broad definition of grievance found in section 7103(a)(9). The Ninth Circuit, on the other hand, has twice narrowly construed the statutory definition in holding that the term "grievance" refers only to complaints that are processed through a negotiated grievance procedure (NGP).

The D.C. Circuit expressly recognized that its holding conflicted with that of the Ninth Circuit's *IRS, Fresno* v. *FLRA*, 706 F.2d 1019 (9th Cir. 1983) decision. *See NTEU* v. *FLRA*, 774 F.2d 1181, 1188 (D.C. Cir. 1985). Stating that it "must *disagree*" with the Ninth Circuit's construction of grievance, the D.C. Circuit asserted that the "language and structure of the statute lead us to a *different result*" than that reached by the Ninth Circuit. *Id.* (emphasis added). The emphasized words express conflict, not agreement.[1]

The circuits are also in direct conflict with regard to the union's interest in being represented at formal discussions concerning grievances pursued through alternative statutory procedures. *See* Pet. 12, 18–19. Again, the D.C Circuit expressly recognized this conflict, stating that it must "disagree" with the Ninth Circuit's view of the union's institutional interests. *NTEU* v. *FLRA*, 774 F.2d at 1188. Luke AFB has not questioned the courts' significant disagreement over the role of unions in the federal workplace, but has merely

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[1]The Ninth Circuit itself has expressed doubts about its reasoning in *IRS, Fresno* v. *FLRA* and suggested that it agrees with the D.C. Circuit. *VA, Long Beach* v. *FLRA*, 16 F.3d 1526, 1534 n.4 (9th Cir. 1994). Luke AFB suggests (Opp. 14) that any intra-circuit conflict is better resolved by the Ninth Circuit and not this Court. However, the Ninth Circuit declined the Authority's invitation to hear the instant case en banc. *See* Authority's Petition (Pet.) Appendix B.

sided with the Ninth Circuit by concluding that the "union's interest in the outcome of EEO proceedings, however, is limited." Opp. 15. The D.C. Circuit takes a different view, positing that the union's interest in how the employer processes "complaints challenging alleged discrimination" is "far broader." *NTEU* v. *FLRA*, 774 F.2d at 1188.

Luke AFB attempts to reconcile the cases by arguing that the alternative statutory procedures involved — those of the MSPB and the EEOC — are different. This argument is unavailing. First, as explained above, the D.C. Circuit in *NTEU* v. *FLRA* (which involved an MSPB proceeding) viewed its decision as conflicting with — not being distinguishable from — *IRS, Fresno* v. *FLRA* (which involved an EEOC proceeding). Though the Tenth Circuit in *VA, Denver* v. *FLRA*, 3 F.3d 1386, 1391 (10th Cir. 1993) distinguished its decision from *IRS, Fresno* v. *FLRA*, it did not suggest that section 7114(a)(2)(A) applies to alternative statutory procedures pursued through the MSPB and not the EEOC. Therefore, it is myopic to assert (Opp. 12) that "[o]nly the Ninth Circuit has directly confronted the issue of whether the union's right of representation applies to EEO proceedings."

Second, with regard to the meaning of "grievance" in section 7114(a)(2)(A) of the Statute, there is no relevant difference between MSPB procedures and EEOC procedures. *See* Pet. 13 n.5. That section refers to "*any* grievance" which in turn is defined in section 7103(a)(9) as "*any* complaint." Luke AFB has not — and cannot — point to anything in the Statute to explain why "any complaint" includes MSPB procedures, but excludes EEOC procedures.

Third, Luke AFB's arguments regarding EEOC procedures apply equally to MSPB procedures. Luke

AFB argues (Opp. 15) that EEOC procedures are established by the EEO statute and accompanying regulations; MSPB procedures are likewise established by the MSPB statute (5 U.S.C. 7701–7703 (1994 & Supp. IV 1998)) and accompanying regulations (5 C.F.R. pt. 1201 (1997)). Luke AFB asserts (Opp. 11) that section 7121(d) preserves an employee's right to pursue EEO complaints through the alternative statutory procedure; the same option is preserved in that section for the pursuit of MSPB appeals. Luke AFB claims (Opp. 15) that the union's interest in the outcome of EEO proceedings is limited; however, Luke AFB does not explain, and indeed no explanation is apparent, why the union's interest in MSPB proceedings would not be similarly limited. Finally, in this regard, Luke AFB argues (Opp. 16 & n.5) that EEO complaints may raise privacy and confidentiality issues; but discrimination matters, and thus the same type of issues, may be raised in mixed-case appeals to the MSPB. *See* 5 U.S.C. 7702.

Fourth, Luke AFB incorrectly attributes significance (Opp. 14) to the fact that the Authority and the MSPB were established as a result of the Civil Service Reform Act of 1978 and the EEOC was not. However, in creating the MSPB and the Authority, Congress expressly contemplated that these new agencies would interact with the EEOC. *See* 5 U.S.C. 7702; 5 U.S.C. 7121(d). As pertinent to section 7114(a)(2)(A) — which provides for union attendance at formal discussions concerning grievances — all three agencies address employees' work-related complaints.

In sum, the courts are in conflict over whether the Statute's formal discussion right applies when employees pursue claims through alternative statutory procedures rather than through NGPs. Luke AFB's attempt to confine the issue in this case to the EEO

context (Opp. (I), 15), and thus ignore the D.C. and Tenth Circuits' broader reading of the formal discussion right, hinges on there being a relevant distinction between MSPB and EEOC procedures. However, as shown above, there is no principled way to distinguish these two alterative statutory procedures and thus the issue in this case is ripe for the Court's review.

II. The Term "Grievance" As Used in Section 7114(a)(2)(A) and Defined in Section 7103(a)(9) Properly Includes EEOC Complaints

In addition to attempting to minimize the current split in the courts of appeals, Luke AFB suggests an interpretation of the Statute at variance with the plain language of sections 7114(a)(2)(A) and 7103(a)(9). Prior to analyzing Luke AFB's interpretation of the Statute, it is important to bear in mind that it is the Authority — not Luke AFB, the Ninth Circuit, or the EEOC (Opp. 16 n.4) — that is charged with, and accorded substantial deference in, administering and interpreting the Statute and its terms. *See National Fed'n of Fed. Employees & FLRA* v. *Department of Interior*, 526 U.S. 86, 99 (1999).

Luke AFB argues that discrimination complaints pursued through EEOC procedures are not "grievances" as the term is used in section 7114(a)(2)(A). Although acknowledging the Statute's broad and inclusive definition of grievance, Luke AFB nonetheless contends that "that definition does not extend to EEO complaints." Opp. 8. Luke AFB's position is thus not only inconsistent with the plain language of section 7103(a)(9), but finds no support in other sections of the Statute, the Statute's legislative history, or other laws.

Luke AFB principally relies on section 7121 of the Statute in support of its assertion that EEO complaints

are not grievances.[2] Such reliance is unavailing. First, as demonstrated in the petition (Pet. 16-18), section 7121 does not narrow the statutory definition of grievance, but instead provides a particular procedure for the resolution of "grievances." *See NTEU* v. *FLRA*, 774 F.2d at 1187–88.

Second, the "grievances" referred to in section 7114 must be broader than the grievances that are processed through the NGP pursuant to section 7121. Union presence is already assured throughout the NGP, pursuant to section 7121(b)(1)(C)(i) and (ii). If, as Luke AFB argues, the right to attend formal discussions concerning "grievances" were limited to grievances processed through the NGP, then the formal discussion right set out in section 7114 would merely duplicate the rights provided in section 7121(b)(1)(C). Such a reading would render that portion of section 7114(a)(2)(A) superfluous. *See Kawaauhau* v. *Geiger*, 523 U.S. 57, 63 (1998) (Court hesitant to adopt interpretation of statute that renders superfluous portion of same law).

Nor does the legislative history support Luke AFB's narrower reading (Opp. 9) of the term "grievance" in section 7114. Relying on a passage in the House Report concerning section 7103(a)(9), Luke AFB notes the "'virtually all-inclusive'" definition of grievance, but also states that "'section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term.'" Opp. 9 (quoting H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978)). This passage, however, provides no support

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[2]Although Luke AFB relies on section 7121, the Ninth Circuit does not do so. In *IRS, Fresno* v. *FLRA*, the Ninth Circuit simply states, without reference to specific statutory language, that EEO complaints are "discrete and separate from the grievance process to which 5 U.S.C. §§ 7103 and 7114 are directed." 706 F.2d at 1024.

for the proposition that EEO complaints are not grievances within the scope of section 7114(a)(2)(A). First, and as noted in the petition (Pet. 18), although the passage indicates that section 7121 excludes *some grievances* from coverage under the NGP, the term "grievance" is not limited to matters covered under the NGP. *See NTEU* v. *FLRA*, 774 F.2d at 1188. Second, to the extent the passage supports a narrowed "effect" of the term "grievance," it does so with respect only to the NGP in section 7121, not regarding the formal discussion right provided for by section 7114.

Similarly unpersuasive are Luke AFB's arguments that EEOC confidentiality safeguards and the Privacy Act (Opp. 15–16) are *per se* legal impediments to the union's right to attend EEO proceedings. Even Luke AFB does not assert that such issues will arise in every case; indeed, none are present here. Rather than adopting a rule uniformly prohibiting union attendance at such sessions, the better course is to permit the Authority, as it has in other cases,[3] to balance individual and institutional interests when and if such issues arise. In short, Luke AFB's confidentiality arguments cannot support a non-literal construction of section 7114 (a)(2)(A) that the Authority has refused to adopt. *Cf. NASA* v. *FLRA*, 527 U.S. 229, 243–44 (1999) ("confidentiality concerns are not weighty enough to

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[3]*See U.S. Dep't of Justice, Bureau of Prisons, Fed. Correctional Inst. (Ray Brook, NY)*, 29 FLRA 584, 590 (1987) (recognizing that the Authority must consider and resolve direct conflicts between rights under section 7114(a)(2)(A) and those under other statutory appeal procedures), *aff'd sub nom. American Fed'n of Gov't Employees, Local 3882* v. *FLRA*, 865 F.2d 1283 (D.C. Cir. 1989); *Federal Aviation Admin., New York, TRACON*, 51 FLRA 115, 123 (1995) (recognizing an individual's privacy interest in an EEO settlement agreement as a basis for rejecting a union's information request under section 7114(b)(4)).

justify a nontextual construction of § 7114(a)(2)(B) rejected by the Authority").

Finally, Luke AFB has pointed to nothing in the EEO laws that is inconsistent with union representation during EEOC proceedings. Therefore, contrary to Luke AFB's assertion (Opp. 12), there was no need for Congress to "amend" Title VII of the Civil Rights Act to specifically permit union representation at section 7114(a)(2)(A) sessions involving EEOC proceedings, just as there was no need for Congress to amend the Inspector General Act to specifically permit union representation at section 7114(a)(2)(B) sessions involving Inspector General personnel, *see NASA* v. *FLRA*, 527 U.S. 229 (1999). In both instances, the Statute generally provides for — and nothing in any other law precludes — union presence.

CONCLUSION

The petition for a writ of certiorari should be granted.[4]

Respectfully submitted,

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[4]The Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.